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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 v.

24 MJ 1971 (JW)

5 ERAN HIYA,

6 Defendant.

7 Conference
-----x

8 New York, N.Y.
9 December 9, 2024
10 11:00 a.m.

Before:

HON. JENNIFER WILLIS,

U.S. Magistrate Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: DANA R. McCANN
TARA LA MORTE
Assistant United States Attorneys

SHER TREMONTE
Attorneys for Defendant
BY: JUSTINE ALETA HARRIS
NOAM KORATI BIALE

ALSO PRESENT:

ROGER POLACK Department of Justice

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1

2 THE DEPUTY CLERK: Good morning.

3

4 Your Honor, we are here for *U.S. v. Hiya*. We ask that
counsel for the government as well as counsel for defense
5 please rise and state your names for the record.

6

7 MS. McCANN: AUSAs Dana McCann and Tara La Morte, for
the government. With us at counsel table is Roger Polack from
8 the Department of Justice Office of International Affairs.

9

10 We are also joined by two paralegals from our office,
Christopher Harris and Lucy Gavin.

11

THE COURT: Good morning.

12

13 MR. BIALE: Good morning, your Honor. Noam Biale and
Justine Harris, on behalf of Mr. Hiya, who is seated to our
14 left.

15

16 I also want to introduce some other members of our
team. We have Wes Erdelack, who is seated in the back; Christa
17 Staropoli, they are both associates of my firm; Hilaria Hunter,
18 who is a paralegal in my firm.

19

20 I also want to introduce Mr. Nick Kaufman who is
Mr. Hiya's Israeli counsel.

21

22 THE COURT: Good morning to you all as well, and to
you, Mr. Hiya.

23

24 I believe my deputy in error introduced this case as
U.S. v. Hiya. It is actually *In the Matter of the Extradition*
25 *of Eran Hiya*, and that is what we are here to discuss today.

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I will turn first to the government. I think we all sort of know that obviously of the five factors that we need to consider that there's really only two that are in dispute, but I believe the government has prepared a PowerPoint so I'll let you get to it now.

MS. McCANN: Thank you, your Honor.

So as your Honor knows, the United States, on behalf of the government of Israel, seeks to extradite fugitive Eran Hiya for his role in attempting to murder a rival gang member, Eli Musli.

If your Honor permits I will walk through the abundant evidence that the government of Israel has put forth, but I will proceed in the following order:

First, by providing a brief overview of the extradition process;

Second, by formally introducing the government's exhibits; and

Third, as your Honor mentioned, by addressing the merits of the request that are at dispute. That's specifically the jurisdiction and probable cause elements.

THE COURT: If I can, Ms. McCann, I would like to just make one change in how you plan to proceed. I think the broad overview and the introducing of the government's exhibits makes sense at the outset.

Then when we get into the two of the five factors that

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1 are in dispute I would like to pause when you are done with the
2 first disputed factor so that I can then hear from the defense
3 and then come back to probable cause rather than having you
4 make the entirety of your arguments.

5 I think that keeping it point to point will make it
6 easier to make sure that everybody has covered everything they
7 want to, and making sure I am putting things in the right sort
8 of box in my head. Hopefully that will not throw off your
9 planned presentation too much.

10 MS. McCANN: Sure. Thank you, your Honor.

11 Specifically, the government of Israel has alleged
12 that Hiya coordinated the attempted murder with several other
13 gang members under his control, he directed gang members to
14 possess firearms and explosives and to conceal the identity of
15 stolen vehicles so that those vehicles could be used to escape
16 the scene of the crime he ordered the gang members to then
17 destroy those vehicles to conceal evidence of their use in the
18 assassination and supply at least one individual with a handgun
19 for the purpose of murdering the rival gang leader and its
20 members.

21 To start with the overview of the extradition process,
22 as you will have read in our briefs extradition, is *sui*
23 *generis*. It is a unique process that is neither civil nor
24 criminal, so neither the Federal Rules of Criminal Procedure,
25 the Federal Rules of Evidence, or the Federal Rules of Civil

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1 Procedure apply in extradition proceedings.

2 So it is a process that is governed twofold: By the
3 federal extradition statute, under Title 18 of the United
4 States Code, Sections 3181 through 3196, as well as the
5 extradition treaty between the United States and the requesting
6 nation. In this case that is the extradition treaty between
7 the United States and the government of Israel.

8 Section 3184 outlines a two part process that
9 allocates responsibility for extradition for two entities
10 within the U.S. government. Those two entities are a judicial
11 officer of the federal court and the secretary of state.

12 Part one is the stage that we are in now. That
13 requires a limited-scope hearing before a federal judge to
14 determine whether the requirements of the applicable treaty are
15 met. The applicable treaty here is the one between the United
16 States and Israel. So part one is not a criminal proceeding.
17 It is akin to a preliminary hearing to determine whether the
18 requirements of extradition are met.

19 If the Court finds that those requirements are met,
20 and I would walk through those requirements in a moment, the
21 Court will then certify to the secretary of the state that the
22 fugitive is extraditable.

23 Part two gives the final authority to the secretary of
24 state. The secretary of state makes the ultimate determination
25 of whether to actually extradite the fugitive by returning the

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1 fugitive to the requesting country.

2 The secretary of state has broad discretion, which
3 encompasses reviewing *de novo* the judge's findings. So the
4 secretary of state may refuse extradition on a number of
5 discretionary grounds, including humanitarian and foreign
6 policy considerations. The secretary of state may even grant
7 extradition with conditions at his discretion.

8 So, as I mentioned earlier, for the Court to certify
9 Hiya as extraditable there are five requirements.

10 The first requirement is whether the Court is
11 authorized to conduct an extradition proceeding. Section 3184
12 authorizes any judge or justice of the United States to conduct
13 proceedings, and Rule 59.1(b) of SDNY Local Criminal Rules
14 authorizes magistrate judges to exercise jurisdiction set forth
15 in Section 3184. So this court is clearly authorized to
16 conduct this extradition hearing, and there is no dispute about
17 that.

18 The second requirement is whether the Court has
19 jurisdiction over Hiya. Now, under Section 3184, this Court
20 has jurisdiction over any person found within its jurisdiction.
21 This element is satisfied because when we filed the complaint
22 and provisional arrest request Hiya was in fact located in the
23 Southern District of New York, and that is sufficient for
24 jurisdiction.

25 Hiya disputes this element by attempting to divert

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1 this court's' attention to a different treaty that is a treaty
2 between the U.S. and a third-party country as well as by
3 alleging due process violations. Now we have outlined this in
4 our briefing and we will discuss this further shortly, but
5 these claims have no bearing on the question of this Court's
6 jurisdiction because the only applicable treaty here is the
7 treaty between the United States and Israel.

8 The third element is whether the extradition treaty
9 between the United States and Israel is in full force and
10 effect. There is no dispute that this element has been
11 satisfied. As we will see in a moment, there is a declaration
12 of C. Danae Ashkar from the State Department's Office of the
13 Legal Adviser which attests that the extradition treaty is in
14 full force and effect.

15 The fourth element is whether the extradition treaty
16 between the United States and the government of Israel covers
17 crimes for which extradition is requested. This element is
18 commonly known as the dual criminality requirement.

19 Article 1 of the treaty provides for the extradition
20 of persons who have been charged with or convicted of any of
21 the offenses mentioned in Article 2 of the treaty.

22 The original text of Article 2 of the treaty, which
23 provided a list of extraditable offenses, was later modified by
24 the protocol of the treaty. And that defines an offense as
25 extraditable if it is punishable under the laws of both parties

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1 by a deprivation of liberty for a period of one year or by a
2 more severe penalty. It also expressly includes attempt,
3 conspiracy, participation, aiding and abetting, and accessory.
4 So, again, this is known as the dual criminality requirement,
5 and the documents submitted by the government of Israel
6 establish that Hiya is facing six counts of violating Israel's
7 penal law. Each of these crimes is punishable in Israel by
8 imprisonment for a period of one year or more and are duly
9 criminal in the United States.

10 The fifth and last element is whether there is
11 sufficient evidence to support a finding of probable cause as
12 to the crimes for which extradition is sought. We will discuss
13 this in more detail in a moment, but Hiya disputes this element
14 by offering evidence that is not admissible or permissible in
15 the context of this limited-scope extradition hearing.

16 The government of Israel's extradition request is
17 supported by abundant evidence that would support a probable
18 cause finding. So, as we discussed, as we mentioned at the
19 outset, we will focus on just elements two and five. Element
20 two is the jurisdictional question, element five being the
21 probable cause question.

22 To the extent your Honor finds that these elements
23 have been met, the government would offer a proposed order,
24 which we have here today if the Court would like to see it, and
25 that proposed order reflects the five elements that we've

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1 discussed.

2 So if your Honor does not have any questions at this
3 point, I will turn to the exhibits. Then I will discuss the
4 elements in more detail.

5 The government intends to submit two exhibits today,
6 both reflecting documents that had been previously filed with
7 the Court.

8 Exhibit 1 is the declaration prepared by C. Danae
9 Ashkar, who is an attorney adviser for the Office of Legal
10 Adviser at the State Department.

11 This declaration serves three important functions.

12 The first function is that it states the view of the
13 executive branch of the U.S. government that the extradition
14 treaty between the U.S. and Israel is in full force and effect.
15 That's one of the elements that the government is required to
16 establish.

17 The second thing is that it states that the offenses
18 for which Israel has requested extradition are covered by the
19 treaty. It also makes clear that the extradition request is
20 authenticated in accordance with the treaty and extradition
21 statute.

22 So as required by the treaty in Title 18, Section
23 3190, the documents submitted by government of Israel are
24 authenticated by the official seal of the ministry of justice
25 and were properly certified on June 23, 2024, by the director

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1 of the department of international affairs of the ministry of
2 justice in Israel.

3 So the declaration attaches two different documents.

4 The first document is marked as Government Exhibit 1A,
5 and that is the diplomatic note from Israel requesting Hiya's
6 extradition. It's dated June 25, 2024. Again, it's marked as
7 Government Exhibit 1A.

8 The declaration also attaches the extradition treaty
9 between the United States and Israel. That includes the
10 convention and the protocol amending the convention. Going
11 forward we will just refer to both of these documents simply as
12 the treaty. That's marked as Government Exhibit 1B.

13 As we might have mentioned, the declaration, the
14 diplomatic note, and extradition treaty were filed on the
15 docket already at ECF 13.

16 Exhibit 2 is the government of Israel's request for
17 Hiya's extradition and the supporting documents that they
18 provided. Those documents were also filed in July of 2024 at
19 ECF 13.

20 So, your Honor, I have original versions of all of
21 these documents which have been marked for identification. I
22 believe you may already have the Bates-stamped version. If you
23 would permit, I would offer the original versions for the
24 Court's consideration. Then I would move to enter those
25 exhibits in evidence.

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1 THE COURT: Any objection?

2 MR. BIALE: Your Honor, no objection.

3 I just want to state for the record that the
4 government has represented that the exhibits that are being
5 introduced are identical to what was previously filed on the
6 docket at ECF 13. We have not double checked, but I am
7 accepting that representation.

8 I probably at some point, or I may refer to parts of
9 the document based on the ECF Bates stamp number, just so we
10 all know what we are talking about, even though the government
11 exhibit that is now being moved for admission doesn't have that
12 Bates number.

13 With that clarification, no objection.

14 THE COURT: Certainly.

15 Obviously we have all heard the government make the
16 representation that the documents in the original form are
17 identical perhaps with the exception of Bates stamp numbers to
18 what has already been filed on ECF 13.

19 MS. McCANN: May I approach, your Honor?

20 THE COURT: You may. And those documents will be
21 admitted.

22 (Government Exhibits 1 and 2 received in evidence)

23 MS. McCANN: As your Honor mentioned, we will start
24 with the jurisdictional question.

25 There are kind of two arguments that are being made,

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1 so if your Honor permits I will walk through just those two
2 arguments under jurisdiction and then hold on the probable
3 cause argument.

4 THE COURT: Yes.

5 MS. McCANN: So, your Honor, the government believes
6 that jurisdiction is met in this case simply because the
7 inquiry is very plain. The basis for jurisdiction in this
8 proceeding falls squarely under Section 3184, which vests this
9 court with jurisdiction over any person found within the
10 jurisdiction of this court.

11 Hiyas was in New York when the government filed its
12 complaint and arrest request, and Hiya was arrested in the
13 Southern District of New York. Hiya has raised arguments that
14 are not germane to the question of whether this Court has
15 jurisdiction over Hiya.

16 Based on the briefing, again, there are two arguments
17 that we expect Hiya will rely on to dispute jurisdiction. The
18 first argument that Hiya raised is an alleged violation of the
19 extradition treaty between the United States and Malaysia
20 simply because Hiya was physically present in Malaysia several
21 days before he was found in New York.

22 This argument has to do with what is known as the rule
23 of specialty, which is enumerated in the extradition treaty
24 between the United States and Malaysia. The rule of specialty
25 is derived from principles of international comity, and it

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1 requires a country seeking extradition to adhere to limitations
2 based on the prosecution by the surrendering country. So the
3 extradition treaty between the United States and Malaysia
4 simply incorporates the rule of specialty by spelling out
5 exactly what limitations would be placed on the country seeking
6 extradition from the other country.

7 The U.S.-Malaysia extradition treaty spells out two
8 limitations in Article 16(1) and Article 16(2). The first
9 limitation under Article 16(1) is that a person extradited
10 under the treaty may not be detained, tried or punished in the
11 requesting country except for offenses for which extradition
12 has been granted and a few other specified circumstances.

13 The second limitation under Article 16(2) is that a
14 person extradited under the treaty shall not be extradited to a
15 third state for an offense committed prior to the person's
16 surrender unless the surrendering state consents.

17 To put Article 16(2) more plainly, if Hiya was
18 extradited from Malaysia to the U.S., the treaty places
19 limitations on the circumstance that is would allow the U.S. to
20 then send Hiya to another third-party country. In this case
21 that would be Israel. These are the limitations that the U.S.
22 and Malaysia have placed on each other when a person is
23 extradited from one country to the other. So the key word
24 here, your Honor, is "extradited."

25 So Hiya argues that by seeking extradition to Israel

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1 that that's a violation of the second limitation outlined in
2 Article 16 of that treaty, but as Hiya concedes in briefing,
3 Hiya was not extradited from Malaysia to the U.S. So the
4 Malaysian extradition treaty does not apply here, and we
5 believe that the Court should disregard it.

6 THE COURT: Is their argument really focused on the
7 treaty though?

8 I mean when we talk about whether or not the United
9 States properly has jurisdiction over someone, certainly there
10 are cases cited by defendant, respondent, whatever the term
11 would be in this kind of proceeding, that sort of speaks to a
12 broader concern about due process, fairness.

13 It seems to me that there's two issues when we are
14 thinking about whether the U.S. properly has jurisdiction. One
15 certainly, as you said, is this question of are we following
16 requirements or whatever agreements we have with our foreign
17 partners. But looking at *Atta I*, for example, it seems to
18 speak to this larger problem that if the U.S. is -- I will call
19 it illegally or some kind of non-due-process-based way getting
20 ahold of someone, that that kind of speaks to a broader
21 interest of the country and the judiciary making sure that kind
22 of thing doesn't happen.

23 I hear you as saying that Mr. Hiya was not in fact
24 extradited from Malaysia, and therefore whatever is or is not
25 in the agreement with Malaysia isn't really the issue.

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1 But what about this broader issue that I see Atta I as
2 raising, that the way in which someone arrives in the United
3 States matters or should matter to the U.S. judiciary?

4 What is your response to that.

5 MS. McCANN: Yes, your Honor. We would agree with
6 that characterization. We believe that the argument they are
7 making in response to jurisdiction is twofold. There is an
8 argument that Hiya was extradited from Malaysia to the U.S. and
9 therefore the treaty between the U.S. and Malaysia has been
10 violated.

11 That scenario requires extradition. So we believe
12 there is a second argument to your point, your Honor, that they
13 are making that is inapposite to the first argument, that
14 because Hiya was not extradited and was, in their words,
15 forcibly taken from Malaysia, that that violates due process.
16 I am happy to address that argument for your Honor now.

17 THE COURT: I don't want to skip ahead if you had more
18 to say on the applicability of the treaty with Malaysia.

19 Maybe the question to ask there goes to the
20 respondent, to Mr. Hiya's argument that Malaysia detaining him
21 and getting him and sending him to the United States, the U.S.
22 asking for all of that was sort of -- they don't use the word
23 ruse, but that that is what is going on.

24 So this question of whether he was technically
25 extradited, whether he was deported, whatever happened in

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1 Malaysia, if the United States initiated that, if they asked
2 Malaysia to arrest him, to get him, to hold him, to give him to
3 the United States, I know that that in part is going to go to
4 our second question, right, but on the first issue of our
5 agreements with Malaysia, if that was done in a way that, I'll
6 call it under false pretenses, where the United States didn't
7 reveal to Malaysia its ultimate intent to send Mr. Hiya to
8 Israel, is there a world where even if his extraction was not
9 technically an extradition that it still does implicate our
10 sort of diplomatic agreements with Malaysia?

11 MS. McCANN: Your Honor, I believe that there is no
12 obligation for us to, for the United States to inform Malaysia
13 of the extradition request from Israel. I can't make
14 representations as to whether the United States agents did in
15 fact inform Malaysia, but I believe our position would be that
16 we are under no obligation to disclose the potentially
17 impending extradition request from Israel.

18 The extradition treaty between the U.S. and Malaysia
19 was just not invoked, and there are other processes by which to
20 obtain an individual from another country such as deportations,
21 expulsions, as is the case here, that can be used to obtain
22 custody over an individual and bring them back to the U.S. We
23 are not required to invoke a treaty just because the treaty
24 exists.

25 THE COURT: Are there, I'll call it due process

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1 requirements for a, I'll term it request to deport?

2 Obviously, we know that when we are trying to
3 extradite from one country or we're extraditing to another
4 country that there's clearly a lot of process involved, but a
5 request for deportation, does that have a list of due process
6 requirements, or does the United States really have to say this
7 is our citizen we would like you to deport them to us?

8 MS. McCANN: We take the position that there are no
9 due process considerations just because an individual was taken
10 from another country outside of the extradition process.

11 I think the crux of this argument falls within what is
12 known as the *Ker-Frisbie* doctrine. That doctrine comes from
13 two Supreme Court cases that basically say that the power of a
14 Court to try a person for a crime is not impaired by the fact
15 that the person has been brought into the Court's jurisdiction
16 by reason of, and the quote I'll use is forcible abduction,
17 which is the phrase they used in those cases and the phrase
18 that Hiya has adopted.

19 I want to be clear before I go into this due process
20 argument that we believe that a due process violation, even a
21 potentially alleged forcible abduction, again to use Hiya's
22 words, is not a defense in an extradition proceeding. An
23 extradition proceeding, as I mentioned earlier, is very limited
24 in scope and it differs from a criminal proceeding and a
25 criminal prosecution.

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1 So the line of cases, particularly *Ker-Frisbie*, and
2 I'll talk about *Toscanino*, which was an exception to that,
3 these involved criminal prosecutions. To your Honor's point,
4 there is one case, which is the *Atta* case, where this analysis
5 was applied in an extradition proceeding. We believe that even
6 if you were to apply this due process consideration in an
7 extradition proceeding, it still does not meet the standard
8 required or the level of allegations required to absolve this
9 Court's jurisdiction over an extradition proceeding.

10 THE COURT: Let me ask you a question. I should have
11 asked this at outset. Obviously the burden is on the
12 government to demonstrate that Mr. Hiya is in fact
13 extraditable. When it comes to the second of the five factors
14 that are being contested, it is clear what the standard is
15 because it's right there in the title. It's probable cause.

16 What is the standard with respect to factor two, this
17 question of whether or not the U.S. has jurisdiction over him?

18 How convinced do I have to be I guess is the question?

19 MS. McCANN: Just so I am understanding your Honor's
20 question, I guess your question is what is the standard for
21 finding -- jurisdiction is the substantive standard.

22 THE COURT: Yes.

23 MS. McCANN: But what is your standard for finding
24 jurisdiction?

25 THE COURT: Yes.

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1 MS. McCANN: I don't believe -- one moment, your
2 Honor.

3 Your Honor, we believe the standard for all five
4 elements would be probable cause, so akin to like the
5 preliminary hearing context.

6 THE COURT: On this I am, because when we were
7 prepping, I was like I don't know what it is. What is your
8 source for that belief?

9 MS. McCANN: One moment, your Honor.

10 Your Honor, I believe we've seen the probable cause
11 standard for all elements in the case law, and we would be
12 happy to brief that for your Honor later today or whenever your
13 Honor permits.

14 THE COURT: Briefing sounds a bit strong. I don't
15 know that it's going to turn on that.

16 MS. LA MORTE: Maybe not a brief, your Honor, but just
17 some case cites.

18 THE COURT: To the extent there is a, case I want to
19 make sure for my own purposes I put everything in the right
20 place. I don't need pages on this issue, just a case that is
21 going to give me the answer. I'm happy to receive that
22 afterwards.

23 You can continue. Thank you.

24 MS. McCANN: Your Honor, on the due process question,
25 again, we just want to be clear that we don't think due process

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1 is applicable in this type of proceeding. That's primarily
2 because it is not a criminal proceeding, so the Fifth Amendment
3 deprivation of the defendant's like civil or criminal rights is
4 not at issue here. This Court is simply tasked with the
5 question of whether or not to issue a certificate of
6 extraditability. So there is no deprivation of a defendant's
7 liberty.

8 If due process was an appropriate consideration for
9 this context, the Second Circuit has made clear that a forcible
10 abduction -- right, again his characterization and the phrasing
11 used in case law -- does not absolve a Court's jurisdiction.

12 There's one case where the Second Circuit made an
13 exception to that and that conduct that was alleged by the
14 defendant, in that case the defendant alleged torture and
15 inhumane treatment. Hiya was deported from Malaysia and not
16 forcibly abducted. His allegations do not rise to the level of
17 the conduct that was raised by the defendant in that one
18 exception.

19 And so, again, this argument we believe falls under
20 the *Ker-Frisbie* doctrine. So that Second Circuit case where
21 the court strayed away from this general understanding that
22 forcible abductions do not absolve a court's jurisdiction, that
23 case is called *United States v. Toscanino*, and the case
24 citation is 500 F.2d 267.

25 In that case, again, your Honor, the allegations

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1 amounted to "shocking governmental conduct." That conduct
2 included extreme violence, torture, forced interrogations.
3 Because of those allegations, the Second Circuit remanded that
4 case for a hearing and required the government to respond to
5 the defendant's claims of torture and inhumane treatment.

6 Generally, the Second Circuit has said and the Supreme
7 Court has said that a forcible abduction alone is not shocking
8 governmental conduct that violates due process.

9 Just a year later the Second Circuit then, keeping
10 *Toscanino* in mind, because they had in this one case, in
11 *Toscanino*, made an exception to the *Ker-Frisbie* doctrine, just
12 a later in *U.S. ex Rel. Lujan v. Gengler* the Second Circuit
13 made a clear -- they made it clear that the *Toscanino* exception
14 was just a limited exception for cases that involved conduct
15 that arose to that level.

16 So *Toscanino* is restricted to very unique and extreme
17 facts. The Second Circuit has reaffirmed *Ker-Frisbie* in *Lujan*,
18 and they also reaffirmed *Ker-Frisbie* in subsequent cases. So
19 nothing Hiya alleges here raises to this level of conduct that
20 was alleged in *Toscanino*.

21 There's one case that we think outlines this notion
22 that this type of consideration does not apply in extradition
23 proceedings. That case is *In Re David*. The cite is 390
24 F.Supp. 521. That's an Eastern District of Illinois case. And
25 that case in particular is a case involving an extradition

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1 proceeding, because again these cases, *Ker-Frisbie*, *Toscanino*,
2 *Lujan*, they are procedurally inapposite to the case here.

3 This is an extradition proceeding, so like *In Re David*
4 in that case, the fugitive alleged that he had been kidnapped
5 in Brazil by agents of the U.S. and returned to New York. The
6 U.S. sought his extradition. So before the court was the same
7 type of extradition proceeding that we have in front of us
8 today, and the government's response in that case was the same:
9 Even if a kidnapping did occur, it didn't deprive the district
10 court of jurisdiction over the fugitive's extradition
11 proceeding.

12 So the Court agreed, applied the distinction between
13 *Toscanino*, in which the Court made that *Ker-Frisbie* exception,
14 and they analyzed that against *Lujan*, which is where the Second
15 Circuit went back and said, in *Toscanino* we didn't mean to make
16 a new rule, that that was just an exception for conduct that
17 arose to that extreme level.

18 So the facts of the fugitive's case in that case were
19 more akin to *Lujan*, and the Court made that point. But then
20 they also made the point that criminal cases where
21 jurisdictional decisions were predicated on Fifth Amendment
22 and due process considerations are not applicable here.

23 THE COURT: Can I pause you for a moment.

24 MS. McCANN: Sure.

25 THE COURT: In *David* was the allegation in terms of

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1 sort of the international underpinnings -- I'm skimming the
2 case. Obviously the allegation was that he had allegedly been
3 kidnapped from Brazil. But was there then sort of an
4 anticipated extradition to a third country, or was it merely
5 the allegation that the U.S. allegedly kidnapped him from the
6 Brazil with the idea of proceeding with some type of criminal
7 proceeding here in the United States?

8 MS. McCANN: I believe in that case -- and I can
9 follow up with that, your Honor -- but I believe in that case
10 there was a request that the defendant or the fugitive in that
11 case be extradited from Brazil to the third-party country, but
12 instead they were able to bring the fugitive in this case to
13 the U.S. and then proceeded with extradition proceedings.

14 THE COURT: Okay.

15 MS. McCANN: So that case didn't end at the district
16 court. The Seventh Circuit upheld that notion, that due
17 process is an issue that is inapplicable in circumstances of an
18 extradition proceeding.

19 We believe that this proceeding, like *David*, is
20 narrow. And because this Court is not depriving Hiya of any
21 liberty, the sole issue is whether Hiya should return to Israel
22 and stand trial.

23 As I mentioned, your Honor, we did want to address the
24 Atta case as our final point we believe on jurisdiction.

25 Atta reflects the single example of an instance when

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1 due process was considered and then the Court applied the
2 *Ker-Frisbie* doctrine in an extradition proceeding context. But
3 that decision was later determined to be wrong as a matter of
4 law and fact.

5 In the first proceeding, which we referred to in
6 briefing and will refer to now as *Atta I*, the magistrate judge
7 didn't certify extradition on jurisdictional grounds because
8 the fugitive had been brought illegally into the United States.

9 The judge in that case was aware that due process is
10 an argument that is more appropriately made in criminal
11 prosecutions. The judge distinguished the *Ker-Frisbie* line of
12 cases because an extradition proceeding is designed to send the
13 individual back to a requesting country, and the court said in
14 *Atta I* that they could not assure that the accused fugitive
15 would receive due process once he was returned to that third
16 country.

17 But in *Atta II*, once the U.S. refiled their
18 extradition request, the district judge found that the previous
19 decision that was made was improper as a matter of law and
20 fact. "On the facts there is no basis for concluding that the
21 request for a fugitive's return to the U.S. would shock the
22 conscience or run counter to the decencies of civilized
23 conduct," and those are quotes used by the Court. On the facts
24 the Court believed that there was just no basis for the first
25 judge to hold that the fugitive's due process rights were

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1 violated.

2 But as a matter of law the court, the district court
3 said that at best the most that could have been drawn from the
4 initial judge's reasoning was that even if the manner in which
5 the person's presence or custody is obtained, even if that
6 violates due process, the remedy for that violation -- on due
7 process, the remedy for that violation would depend on the
8 process that that person is afforded in subsequent proceedings.
9 So that's proceedings after the extradition hearing takes
10 place. And this district judge interpreted that to mean that
11 we would, as a remedy, need to assure that due process was
12 afforded to the fugitive in that third-party in the requesting
13 country.

14 So, your Honor, in closing, we would just like to
15 emphasize that the government is equally invested in assuring
16 that Hiya is afforded due process. We just believe that this
17 is not the correct forum for that argument.

18 To the extent your Honor believes that due process
19 considerations should be applied, it still doesn't arise to the
20 level of what has been alleged in the exception to the
21 *Ker-Frisbie* doctrine.

22 THE COURT: So your position is that the only
23 exception would be -- you are saying shocks the conscience, but
24 the only example we have here is if there is torture that is
25 alleged.

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1 Is that your position?

2 MS. McCANN: That is right, your Honor. That's right.

3 Your Honor, just to put some color on that, I think
4 this may have been mentioned in our briefing, but the
5 allegations in *Toscanino* were very extreme. That is the one
6 case where the Second Circuit still didn't fail to extradite
7 the fugitive, or didn't absolve the Court's jurisdiction, but
8 in this case they found that because the allegations were so
9 extreme they remanded it for a hearing to at least have the
10 government respond to the allegations that the defendant was
11 making.

12 The defendant alleged very egregious conduct: Torture
13 and interrogation that lasted for 17 days. There were
14 electrodes attached to the defendant's genitals, his toes, his
15 earlobes. He was shocked into unconsciousness. The defendant
16 in that case was forced to respond to interrogation by having
17 alcohol flushed into his eyes and other openings in his body.
18 His fingers were pinched with pliers, and he couldn't walk for
19 seven or eight hours. He was subject to sleep deprivation,
20 force fed only enough to keep him alive. I mean the
21 allegations in that case were extreme. What is being alleged
22 here is nowhere near the conduct that was being alleged in
23 *Toscanino*.

24 THE COURT: Before I turn to Hiya, let me ask you, you
25 argued that in *Atta II*, as you're referring to it, that the

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finding of the district court judge was that as a matter of law
Atta I had been incorrect.

I did sort of skim everything obviously, but there is a lot of material here. My recollection is that there was a change in the facts that were offered up in Atta II, and that based on those new facts the district court judge was able to conclude that the issue had sort of been resolved, that it was not so much, you know how we sometimes see there is an appeal to a DJ, and the DJ says this decision was incorrect, but instead the DJ was presented with additional facts when the government sought extradition again. So it wasn't so much that the DJ was finding that as a matter of law the magistrate judge had been incorrect in the first instance.

Is that your reading of those cases?

MS. McCANN: Sorry. One moment, your Honor.

Your Honor, I believe that that may be correct, but I think the crux of the argument that we're making with regard to Atta is that even though additional facts may have been provided to the Court, the overarching decision was that even if you apply the *Ker-Frisbie* doctrine, the fugitive's allegations did not arise to the level that's required for dissolution of the Court's jurisdiction.

In order for this Court to not have jurisdiction over the extradition hearing or for there even to be a question that the Court has no jurisdiction over this hearing, there would

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1 have to be very extreme conduct alleged. Even then I don't
2 know that it would absolve this Court's jurisdiction. I think
3 it would just be a matter of, a question of gathering more
4 information on that issue.

5 But, your Honor, taking the *Ker-Frisbie* doctrine on
6 its face, what Hiya has alleged simply does not rise to that
7 level. So we think that *Atta* really supports our argument
8 because --

9 THE COURT: I want to make sure I understand.

10 MS. McCANN: Sure.

11 THE COURT: It doesn't arise to that level because in
12 fact there was a legal process, i.e., deportation; or it
13 doesn't arise to that level, even if he were in fact, I don't
14 know, black ops, rendition, whatever it is, from Malaysia?

15 MS. McCANN: It doesn't arise to that level because
16 Hiya doesn't allege any conduct that arises to that level. The
17 *Ker-Frisbie* doctrine says that just because someone is forcibly
18 abducted that doesn't divest a Court's jurisdiction. You have
19 to allege specific conduct that rises to the level of
20 *Toscanino*.

21 Our understanding of Hiya's allegations is that he was
22 not given an explanation about the crimes for which he was
23 charged. Malaysian police held him for a certain amount of
24 time, may not have allowed him to speak to an attorney.

25 We can't attest to these allegations, but nothing that

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1 Hiya alleges, even taking them on their face, taking them as
2 accurate, they don't rise to the level of *Toscanino*.

3 So while we think applying this argument in this
4 proceeding, in a limited-scope extradition hearing is
5 inappropriate, we do think that even if your Honor were to
6 apply that doctrine, Hiya's allegations don't meet that
7 standard.

8 If you have no further questions, I will hold the
9 probable cause argument and I will take my seat.

10 THE COURT: Yes. Thank you.

11 MS. McCANN: All right.

12 MR. BIALE: Good afternoon in one minute, your Honor.

13 So I want to start with where government counsel
14 started and where your Honor actually started, which was the
15 caption of this case.

16 This is not a criminal case. This is not the United
17 States of America v. Eran Hiya. It is an extradition
18 proceeding for extradition out of the country to a third party
19 country.

20 Why is that important?

21 Because all of the cases that the government has
22 marshaled and discussed in its comments to you this morning,
23 the *Ker-Frisbie* doctrine, *United States v. Alvarez-Machain* --
24 which is a Supreme Court case, I am just going to call it
25 *Alvarez* -- and *Toscanino*, those are all criminal cases in

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1 United States courts brought for crimes committed in the United
2 States.

3 THE COURT: Well, with the exception of *In Re David*,
4 which was the one I was --

5 MR. BIALE: I will get to that in a moment.

6 I want to make it clear, though, that the *Ker-Frisbie*
7 doctrine and the exception that the Second Circuit recognized
8 to it in *Toscanino* really has no bearing on this proceeding.

9 Those are all cases where the Court's jurisdiction
10 arises under its original jurisdiction under 18 U.S.C. Section
11 3231. This case arises instead under the Court's jurisdiction
12 from the extradition statute as Ms. McCann mentioned.

13 That is a completely different line of doctrine. And
14 the case that I brought to the Court's attention this morning,
15 which is *Lo Duca v. United States*, makes it clear that in fact
16 the Court's jurisdiction over this matter doesn't even arise
17 from Article III.

18 In this case, when the Court is sitting as essentially
19 an extradition officer, the Court is effectively a commissioner
20 of the executive branch. That's what the Second Circuit said
21 in *Lo Duca*. That does not mean that due process and the
22 constitution don't apply.

23 The government said in its opening remarks there are
24 no due process considerations here. Due process is not
25 applicable because this is not a criminal proceeding, but as

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1 the Court knows, due process is implicated in civil
2 proceedings, due process is implicated in proceedings that are
3 held before the executive branch. The sort of fundamental
4 procedural due process case, *Matthews v. Eldridge*, is about an
5 executive branch adjudication and limits on personal
6 jurisdiction, which is what we're arguing here. We are not
7 saying that the Court lacks subject matter jurisdiction. The
8 Court has subject matter jurisdiction under the statute.

9 What we are arguing is that the way in which Mr. Hiya
10 was brought undermines and divests the Court of personal
11 jurisdiction. It is well established, since cases as old as
12 *International Shoe*, that due process is implicated in personal
13 jurisdiction questions.

14 Okay. So I just want to lay that all out. That's
15 pretty high-level legal theory, but it is important because
16 that sets the stage for what we are talking about.

17 THE COURT: Is the --

18 MR. BIALE: I'm okay.

19 THE COURT: I had a situation where a Court
20 interpreter went down quite hard tripping over a cord, so we
21 don't want a repeat of that --

22 MR. BIALE: I appreciate it.

23 THE COURT: -- and turn it into a whole scene.

24 Is the personal jurisdiction due process question the
25 same -- when we think about personal jurisdiction of the Court,

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1 often that comes up in any type of case, civil cases, but here
2 if what is governing our actions here is the federal
3 extradition statute -- I guess what I am saying is are they
4 identical?

5 The personal jurisdiction requirements under the
6 extradition statute, can we just borrow those wholesale from
7 the broader jurisprudence with respect to personal jurisdiction
8 in the court?

9 MR. BIALE: I don't think you need to do that, your
10 Honor, and I don't think there are cases saying that. I raise
11 those issues because it's clear that due process is implicated
12 in this proceeding. The notion that there are simply no due
13 process rights for an American citizen brought here by the
14 United States government under false pretenses -- and I will
15 get to that -- for the purpose of extradition to a third
16 country in a situation where we know from the treaty that
17 Malaysia would not have consented had it known that that was
18 the government's purpose, I think the notion that there are
19 simply no due process implications, that Mr. Hiya has no
20 constitutional rights with regard to this proceeding, that
21 can't be the law.

22 I raise the issue about personal jurisdiction just to
23 make the point that in that context, due process clearly
24 applies, and the question for the Court is how it applies here.

25 Now, there are limited cases explaining how due

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1 process applies in an extradition-out proceeding. I think your
2 Honor has zeroed in on basically the one case where this issue
3 is really discussed at length, which is the *Atta* case.

4 I will talk about why *Atta I* is good law and why the
5 Court should follow it, and why *Atta II* does not bind the
6 Court, the language about how *Atta I* was decided wrongly on its
7 facts is dicta, and how *Atta II* makes some of the same legal
8 errors that the government is making in its argument. I am
9 going to talk about that later.

10 But *In Re David* is a similar issue, where it's just
11 factually distinct from this case. In that case, an individual
12 was properly brought here. I think -- I will double check --
13 he alleged that he was not. But he was tried here for crimes
14 in New York.

15 Subsequent to that, France initiated an extradition
16 proceeding against him. There was no evidence that the United
17 States had colluded with France to obtain Mr. David from
18 Brazil, that it concealed from Brazil the true purpose of
19 bringing him here or anything like that. None of those facts
20 are present in the *David* case.

21 The only case that is really on all fours with this
22 case in terms of the facts is *Atta I*. I want to get to that,
23 but if I may, your Honor, I just want to talk a little bit
24 first about what some of the key facts are and what I think is
25 not in dispute in this case and what is in dispute.

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1 First of all, before I do that, let me just move
2 admission, as the government did, of the exhibits that were
3 attached to our briefing, and in addition, the affidavit that
4 we submitted to your Honor from Malaysian counsel. We
5 submitted it by e-mail and on the docket. I handed a copy of
6 it up to your Honor before.

7 These are the documents that we are relying on. I
8 don't think there is any question as to their authenticity, so
9 we would move their admission.

10 MS. McCANN: Your Honor, we would object to the
11 admission of the affidavit that was submitted just a few days
12 ago.

13 As to the exhibits that were attended to Hiya's brief,
14 those are already part of the case record, so there is no
15 objection there. But the government's position is that there
16 is no evidence that Hiya's offering that is admissible in this
17 type of proceeding. So we would object to the admission of
18 additional document in evidence in this case.

19 MR. BIALE: I heard the government say before that the
20 rules of evidence don't apply. So I guess your Honor can do
21 whatever you want in terms of admissibility.

22 But I don't quite understand the distinction of the
23 exhibits to our briefing being part of the record of this case.
24 We want them to be part of the evidentiary record of this
25 hearing. They are documents that either came from the

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1 government or there is an affidavit from Mr. Hiya that is
2 properly authenticated. The affidavit from Malaysian counsel,
3 which we submitted, and it's docket 28, that is also
4 authenticated as required under the laws of Malaysia.

5 In addition to that, the affidavit follows the
6 convention of admitting declarations made outside the
7 jurisdiction of the United States, which is simply to affirm
8 that under penalties of perjury under the laws --

9 THE COURT: I don't think the government's objection
10 is based on the idea that the document somehow isn't
11 authenticated or didn't follow the usual requirements of the
12 Federal Rules of Criminal Procedure or the Federal Rule of
13 Civil Procedure.

14 I heard Ms. McCann's objection as being a broader one,
15 that in an extradition defense, respondent, Hiya, the person
16 whose extradition is being sought, extraditee perhaps, is not
17 allowed to present evidence in the usual course that you would
18 if there was a trial.

19 Look, regardless of all that, I am going to admit it
20 for this purpose. I think that it should be part of the record
21 to the extent that if this is reviewed later on appeal, the
22 idea that there's something out there I think it should be
23 preserved. Whether or not it will be something that I in fact
24 rely on when we sort of get to arguments about are you
25 putting -- I think it really goes more to the probable cause

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1 piece of the case, but the question of can defense put forward
2 evidence, is that allowed, what is the limited scope, I will
3 obviously take all of that into consideration. But at the very
4 least I see no harm in admitting it so that it is part of the
5 record.

6 As Hiya's counsel has pointed out, there are other
7 affidavits and declarations and the like that had been included
8 and the government has no objection to as part of their motion
9 papers. Presumably if this document had been available sooner,
10 it would have been included in that number.

11 So I will admit all of defendant extraditee --

12 MR. BIALE: You can say defendant.

13 THE COURT: Extraditee's documents.

14 MR. BIALE: Okay. Thank you, your Honor.

15 Of course, I am going to refer to the documents now
16 just as they go to the jurisdictional question before the
17 Court, not to the probable cause consideration. I will say
18 with respect to the standard -- and candidly this is not an
19 issue that we've done a lot of research on -- but think the
20 standard for finding jurisdiction in most circumstances is a
21 preponderance of the evidence, not probable cause. But to the
22 extent that's a concern for the Court, I would welcome the
23 government's invitation to brief it very short fashion later.

24 So turning to some of the facts, let me just highlight
25 a couple of pieces of the chronology because I think they're

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1 important here.

2 So, as we know from the documents that we've
3 submitted, talks between Israel and the United States about
4 locating Mr. Hiya go back to at least July 2020. We know that
5 a red notice was issued by Interpol for Mr. Hiya's arrest on
6 April 5, 2024.

7 That red notice, as all red notices, had to be based
8 on a valid arrest warrant issued by a country, and in this case
9 it was issued based on an arrest warrant from Judge Avital
10 Gilboa in the Tel Aviv magistrate's Court. That was issued on
11 or about April 4. That is an arrest warrant for the crimes
12 that are at issue in this extradition proceeding.

13 There is no case against Mr. Hiya in the United States
14 at that point. There is solely coordination between the United
15 States and Israel to try to locate Mr. Hiya to send him to
16 Israel to face those charges in Israel.

17 Now, after that red notice is issued, the United
18 States knows at that point, because its partners in Israel told
19 it so, that Mr. Hiya was in Malaysia. The United States
20 government then kicks into high gear, scrambles to get an
21 arrest warrant for Mr. Hiya here on what I am going to call the
22 sham passport fraud case, and I will explain why later.

23 It then tells Malaysia, we want Mr. Hiya brought to
24 the United States to face this passport fraud case. It sends
25 Malaysia documents from which it has scrubbed any mention of

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1 the Israeli arrest warrant, any mention of the fact that
2 Mr. Hiya is an Israeli citizen, and any mention of Israel other
3 than one document that just says he is a rival of some Israeli
4 gang.

5 But they take out the fact that he has an Israeli
6 passport. They take out the fact that he is an Israeli
7 citizen. That is all in documents that are going back and
8 forth between Israel and the United States but are scrubbed
9 from the materials sent to Malaysia.

10 The United States gets an indictment for Mr. Hiya on
11 May 6, 2024, on the passport fraud case.

12 Then on May 10, 2024, Israel issues a second arrest
13 warrant. It is unclear with why Israel would need to issue a
14 second arrest warrant just a month after it had issued an
15 arrest warrant for Mr. Hiya on the same charges that were the
16 basis of red notice.

17 But that second arrest warrant, your Honor, is the one
18 that Israel cites in its request for extradition, that the
19 government cites in its papers to your Honor. The reason I
20 submit is because the United States and Israel want this Court
21 to believe that the charges in Israel postdate the charges in
22 the United States.

23 That is not true.

24 The charges in Israel came first. Then they got a
25 second arrest warrant to make it appear that the charges in

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1 Israel only arose after the indictment was obtained here in the
2 United States.

3 THE COURT: This question may be coming a bit
4 prematurely, because you have already sort of teed up the idea
5 that you are going to talk about the sham passport case, but
6 let me sort of throw this out there, and then you can either
7 respond now or when you think it would be most useful.

8 I guess I have a broad question about whether or not
9 pretext matters, right? Just for local stuff in America, it is
10 fine for the police to follow somebody that they have been
11 targeting for some big offense and wait until they invariably
12 commit a traffic offense and then pull them over even though
13 that's not really why they were following them.

14 So I certainly hear your argument that the United
15 States is holding back information in terms of their
16 communications with Malaysia, but as long as the communications
17 that they do make are truthful, what I mean by that is, Hiya is
18 also a citizen of the United States. Perhaps they are not
19 obligated to say he is a citizen of Israel. And also is there
20 a third? Turkey?

21 MR. BIALE: Poland.

22 THE COURT: Poland. As long as they are truthful that
23 he is a citizen of the United States such that he could be
24 deported here, as long as they are truthful that there is a
25 crime that he could be charged for in the United States and

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1 ultimately is charged with, the United States gets a warrant
2 for him, he's indicted by a grand jury sitting in this
3 district, so whether they truly want him on an offense, which I
4 have never seen anyone gotten from another country on an
5 offense of that type with the sort of guideline range that it
6 carries, but to the extent that there is at least probable
7 cause at this point that he committed a United States crime
8 that has jurisdiction in the Southern District of New York,
9 does it matter that there may be a deeper motive, as long as
10 that information that was presumably transmitted to Malaysia is
11 truthful? Does it really matter that the U.S. has a deeper
12 agenda and doesn't care about this passport fraud and just
13 plans to send him to Israel?

14 MR. BIALE: If I may have a moment.

15 THE COURT: Yes.

16 MR. BIALE: Your Honor, I think it matters for a
17 couple of reasons.

18 First, to be sure, pretext is allowed in certain
19 contexts in American law. But at the same time, material
20 omissions are treated the same as material misrepresentations.

21 Why are the omissions of Mr. Hiya's Israeli
22 citizenship and the Israeli case material in this situation?

23 Well, I think the treaty between the United States and
24 Malaysia shows you why that's material. That is information
25 that Malaysia would want to know in deciding how to deal with

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1 an individual within its jurisdiction, because Malaysia does
2 not want to transfer an individual to a country with which it
3 has an extradition treaty just so that person can be
4 transferred to a third-party country with which it does not
5 have an extradition treaty.

6 So it is a material omission by virtue of the fact
7 that they know that if Malaysia knew their true purpose they
8 would not surrender Mr. Hiya to the United States.

9 Now, it is also important, your Honor, because the
10 government has argued before this Court that -- and let me just
11 say we have obviously asserted that this was a ruse and that
12 the United States did not inform Malaysia about its true
13 purpose. The government has not contested that. I think that
14 it is effectively admitted in this proceeding, and they've put
15 forward no evidence to suggest that Malaysia had any awareness
16 of it. In fact, Ms. McCann said we're under no obligation to
17 tell them. That obviously distinguishes this case from what
18 happened in *Atta II*, but I will get back to that soon.

19 The other reason why it's important, your Honor, is
20 because the government is relying on an argument that Mr. Hiya
21 was not transferred pursuant to the extradition treaty, instead
22 that he was deported.

23 Now, why would Malaysia deport Mr. Hiya to the United
24 States?

25 Well, they would do so based on representations from

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1 the United States that he is a United States citizen. He's
2 wanted on a crime here. That's the purpose of the transfer.

3 But we know, your Honor --

4 THE COURT: People get folks who are United States
5 citizens in another country that we want on an alleged crime
6 here through extradition as well. I don't read the treaty with
7 Malaysia, the extradition treaty as saying extradition is only
8 appropriate in these circumstances, but if it's a U.S. citizen
9 wanted in the U.S. for a U.S. crime, then we only go
10 deportation.

11 I guess part of this comes to another question that
12 perhaps is a bit premature, so I will throw it out there as
13 something I'm thinking about and, again, you respond when you
14 think it's most effective.

15 But in the first part of this two-part argument here,
16 you talked about the I idea that this was a material omission
17 and therefore a material misrepresentation because of the
18 treaty with Malaysia, and you spoke about what Malaysia would
19 or wouldn't have done or would have intended and the like.

20 But that -- and again this may be taking this out of
21 order -- but that speaks to this question of whether or not an
22 individual can have some cause of action to try to enforce a
23 treaty.

24 Isn't the issue that if Malaysia thought that the U.S.
25 was violating some agreement with Malaysia that Malaysia would

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1 have to, you know, somehow appear or make itself known to the
2 United States as opposing this? As far as I know Malaysia has
3 not done that.

4 So this whole thing about it's material because of how
5 it would have affected Malaysia, I would read into the lack of
6 any communication with Malaysia as saying that Malaysia doesn't
7 care, and I don't know that we can just assume what Malaysia
8 would or would not have done.

9 MR. BIALE: Your Honor, I think you are raising the
10 standing issue that the government has brought up. I think
11 that is a total red herring. I will get to that. It is
12 certainly in the outline.

13 But let me just say before we leave the subject of
14 whether Mr. Hiya was deported or not, as the government has
15 asserted, that is simply factually untrue. They have no basis
16 to make that assertion.

17 What they are relying on for that is a communication
18 that the FBI requested Mr. Hiya's deportation. That is at page
19 5 of the government's reply.

20 But we have provided actual evidence that Mr. Hiya was
21 not in fact deported from Malaysia. That's Exhibit Z to our
22 opposition, which is a record from the Malaysian immigration
23 department stating that Mr. Hiya was not deported or expelled.
24 That is also the affidavit that I mentioned earlier of
25 Malaysian counsel, stating that under Malaysian law Mr. Hiya

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1 was not deported.

2 There was initially an attempt by Malaysia to deport
3 Mr. Hiya to Poland. Why did they want to deport him to Poland?
4 Because that was the country whose passport he entered Malaysia
5 on.

6 They told him to get a ticket to go to Poland. He did
7 so. But then shortly before the flight, they canceled the
8 ticket at the behest of the Americans. Okay?

9 So Poland would have been the country that Mr. Hiya
10 would have been deported to had he in fact been deported from
11 Malaysia. There's no evidence in the record to suggest that he
12 was deported, and the evidence that is in the record
13 emphatically suggests that he was not. Under Malaysian law he
14 was not deported.

15 So the government saying that, it is not factually
16 accurate. Your Honor should not rely on that representation.

17 This is a case where Mr. Hiya we concede was not
18 extradited pursuant to the treaty. He was not deported. There
19 is really only one thing left, and it's consistent with the
20 facts here. He was forcibly abducted from Malaysia and brought
21 to the United States.

22 So I just want to make those factual points all clear.

23 THE COURT: All right. But based on the government's
24 argument sort of the method -- well, if he was extradited, that
25 would be one thing, right? Because that would have to be

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1 following the requirements of our treaty with Malaysia, and any
2 other way that he gets here obviously, they are arguing he was
3 deported, but they also said that their argument is the same if
4 he is forcibly abducted, kidnapped, whatever language we want
5 to use.

6 MR. BIALE: Well, their argument if he was forcibly
7 abducted, I think, as I understood it, was that if that's the
8 case, then the *Ker-Frisbie* doctrine applies and Mr. Hiya cannot
9 raise the circumstances in which he was brought here as a
10 defense to this proceeding, right?

11 That's what they said and that is in fact what is on
12 the screen right now. But the *Ker-Frisbie* doctrine simply does
13 not apply to this case. *Ker-Frisbie*, again, as I mentioned
14 earlier, is about criminal proceedings brought against an
15 individual in United States courts for crimes committed in the
16 United States. That is the holding of *Alvarez* as well.

17 And, you know, the government concedes in its brief --
18 that is at page 7 of their reply -- that these defendants are
19 in a completely different posture from Mr. Hiya, because they
20 were brought here to face criminal proceedings in the United
21 States. I agree with that concession. That line of cases does
22 not apply to this situation.

23 The only case that we have really that applies to the
24 situation or the only two cases I think are *Atta* and *David*.

25 And in *Atta* we have this sort of two-part decision; we

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1 have *Atta I* and *Atta II*. And then in *David* we have the
2 district court's describe, which doesn't really describe the
3 facts. There is a little bit more description in the Seventh
4 Circuit opinion that comes later.

5 But let me just go to the reasoning in *Atta I*.

6 So in *Atta I*, Judge Caden held that there were
7 essentially two reasons why extradition-out cases are different
8 than extradition-in.

9 I am going to cite some language from the decision on
10 page 20 to 21 of 1988 WL 66866.

11 Judge Caden quotes from *In Re David*. He says, "In *In*
12 *Re David* Judge Foreman stated in the analogous area of
13 interstate extradition the rule has long been that one state
14 still has jurisdiction to try a criminal defendant even where
15 the defendant was forcibly abducted from another state by
16 agents of the state which eventually tried him," citing *Frisbie*
17 and *Ker*.

18 Judge Caden then says -- that is the end of the quote
19 from *David*. Judge Caden then says, "This conclusion was
20 reached based on the rationale that 'due process of law is
21 satisfied when one present in court is convicted of a crime
22 after being fairly apprised of the charges against him and
23 after a fair trial in accordance with constitutional procedural
24 safeguards.'" That is a quote from *Friesby*.

25 Judge Caden then says, and this is the important

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1 point, "In an extradition proceeding designed to send the
2 defendant out of the United States, the court cannot assure
3 that the accused will receive due process. For this reason,
4 application of the *Ker-Frisbie* doctrine to extradition cases
5 involving requests by other countries to extradite U.S.
6 citizens who have been brought illegally into the United States
7 violates due process."

8 Judge Caden did not go into what kind of process would
9 be due, what would occur in Israel. That's for good reason
10 because there is a separate doctrine of noninquiry, which
11 prevents this Court from inquiring into those questions.

12 Judge Caden's holding on this front about procedural
13 due process concerns is reinforced by language in *Ker*. In *Ker*,
14 the Court grounded its holding in the fact that the due process
15 of law here guaranteed is complied with when the party is
16 regularly indicted by a proper grand jury in the state court,
17 has a trial according to the forms and modes prescribed for
18 such trial, and when in that trial and proceedings he is
19 deprived of no rights to which he is lawfully entitled.

20 THE COURT: Let me put this out there again to let you
21 know this is a thing I'm thinking about.

22 What use am I to make of the fact that there is a
23 pending United States case? Meaning if this were purely the
24 U.S., you know, by hook or by crook sort of gets somebody from
25 Malaysia, they lie to them, they omit, they black ops, whatever

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1 they do, and then promptly begin proceedings to send the person
2 to Israel, I think we are in that territory, how did we get
3 this person, what is going on here, let's do further inquiry,
4 it is concerning.

5 The existence of a passport case, whether it was -- I
6 don't want to say manufactured, whether that case was brought
7 as a pretext or not, there is an indictment by a grand jury
8 sitting in the Southern District. So it is not a sham in that
9 way.

10 It is not that they just claimed there was a charge
11 and really there wasn't one, even if that charge were brought
12 expressly to legitimize this process.

13 How, if at all, do I overlay that with *Atta*? The
14 issue in *Atta* seems to be the section which I have out and
15 marked in my review of the case as well, is that if the person
16 is, you know, call it kidnapped for the purpose of bringing
17 them here from one state to the other, whatever it is, they
18 know that they are going to get due process in a criminal
19 proceeding because it is here.

20 If they're kidnapped, as in *Atta* -- again, I am using
21 this language just as a shorthand -- for the purpose of sending
22 them elsewhere, we don't know what's going to happen elsewhere
23 and that's why due process becomes a concern or the due process
24 concerns come to the for.

25 But here he does have a U.S. case, where presumably --

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1 it is a case here in the Southern District of New York -- he
2 would be getting due process.

3 How does the existence of whatever the case number is
4 for the passport case, how does that overlay with Atta?

5 MR. BIALE: I think -- and I probably will end up
6 eating my words when this issue comes up in the passport fraud
7 case, I think because of *Ker-Frisbie* and *Alvarez*, Mr. Hiya
8 would not be able to raise these circumstances of how he was
9 brought here as a defense to that case. He can't move to
10 dismiss the indictment as a defense to that case.

11 Now, I will just say as a footnote, your Honor, the
12 circumstances under which he's brought here are at issue in
13 that case, and Judge Marrero has remanded to Judge Netburn to
14 hold an evidentiary hearing on those circumstances because the
15 collusion between the United States and Malaysian officials in
16 that case could have Fourth Amendment implications that relate
17 to the seizure of Mr. Hiya's devices.

18 THE COURT: I will describe for the record briefly, I
19 don't think it matters, just in the interest of transparency,
20 it's common that judges will sometimes phone a friend and
21 discuss issues. I did get a call from Judge Netburn about
22 exactly that hearing.

23 We spoke briefly, and as it soon as it was clear that
24 it was connected to this case, in an abundance of caution I was
25 like,, oh, I have the extradition perhaps we shouldn't talk.

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1 We got no further than her saying enough for me to
2 figure out that it was Mr. Hiya's case. Again, I don't think
3 it has any effect on anything, and frankly we probably could
4 have discussed things about the hearing, but I did demur
5 because I was connected to this case, but thank you.

6 MR. BIALE: Fair enough, your Honor.

7 I didn't mean to cause problems by raising it. I
8 bring it up just because the different postures are significant
9 and what kinds of arguments Mr. Hiya can raise in this
10 proceeding versus that proceeding are governed by different
11 lines of case law.

12 To take your Honor's hypothetical, I think if you had
13 a situation where Mr. Hiya is in Malaysia, the United States
14 discovers that, the United States brings a passport fraud
15 charge against Mr. Hiya, for whatever reason the United States
16 decides it's worth their while to send three agents across the
17 globe to pick someone up for a zero- to six-month passport
18 fraud case and bring him here -- by the way, I will just note,
19 and this is in the record that we have put before the Court,
20 when they brought him here on the plane and attempted to
21 question him, they only asked him questions about the Israeli
22 case, not about the passport fraud case.

23 Okay. But let's say that all happened. He comes
24 here, he stands trial in the Southern District of New York in
25 front of Judge Marrero, he's convicted or acquitted on the

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1 passport fraud case.

2 Then subsequently Israel says: Oh, you know what, we
3 have a case against him. We want to bring an extradition
4 proceeding so that when your case is done, bring him over here
5 and we will try him for our case.

6 That would be a totally different situation. I think
7 in that hypothetical the Court clearly could say, look, it's
8 easy to disentangle these two issues because they are totally
9 unrelated to each other.

10 Here it is impossible to disentangle those, and it's
11 impossible to disentangle them because we have a record of
12 Israel and the United States colluding with each other to get
13 Mr. Hiya from a country that does not have an extradition
14 treaty with Israel, and then we have the actions of the United
15 States vis-a-vis Malaysia -- I have an extra pen, your Honor.
16 I want you to take notes on what I am saying.

17 THE COURT: Thank you very much.

18 MR. BIALE: So you have all of that. You have a
19 factual record before you that makes this case like *Atta I*,
20 right?

21 Even though I concede that in *Atta I* there was not a
22 prosecution in the United States. That is a point of
23 distinction. But the facts as they were presented to
24 Magistrate Judge Caden in *Atta I* were basically on all fours
25 with this case.

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1 It was alleged there was a ruse, that because
2 Venezuela did not have an extradition treaty with Israel, the
3 United States government contrived to bring him here by
4 forcible abduction. That is what Magistrate Judge Caden was
5 concerned about.

6 To go back to my description of his decision, there
7 was a second reason that he cited for concern. There was the
8 procedural due process issue that he raised. Then there were
9 also concerns that he had about the law of foreign relations.
10 He said this would force the Court to take sides and place the
11 interests of Israel over the interests of American citizen.

12 Now, this point is important I think because of
13 something that Judge Korman later says in *Atta II*.

14 So then we get to *Atta II*. The United States brings a
15 new extradition proceeding. It is on completely different
16 facts that basically sort of cure the problems that occurred in
17 *Atta I*.

18 If you look at Judge Weinstein's habeas decision and
19 the Second Circuit's affirmance of it, it really grounds the
20 jurisdictional point on the fact that *Atta* was properly
21 deported from Venezuela.

22 That's what the government wants you to do here, even
23 though there's no evidence to support the fact, to support the
24 assertion that Mr. Hiya was properly deported.

25 So *Atta II* is distinguished on its facts. But,

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1 importantly, Judge Korman also dismissed the concerns about
2 foreign relations by saying, and this is a quote from *Atta II*,
3 This case does not involve either "the infringement of a
4 foreign nation's territorial sovereignty, which results from
5 unlawful seizure and abduction of persons" -- that is a factual
6 case -- or "a possible affront to the foreign nation's
7 sovereignty which results from obtaining the surrender of a
8 defendant under false pretenses."

9 That's from *Atta II*, 706 F.Supp. at 1038.

10 Judge Korman didn't pull that out of thin air. That
11 is from a Second Circuit case called *Fiocconi v. Attorney*
12 *General*. Let me get you the cite for that one.

13 THE COURT: I believe my law clerk has it.

14 MR. BIALE: Then we are good. That was a case where,
15 similarly, an individual was extradited -- or I'm sorry,
16 withdrawn -- was brought here not pursuant to an extradition
17 treaty.

18 THE COURT: Let me just put it in the record so that,
19 one, it is on the transcript and, two, the government is
20 directed to it. *Fiocconi v. Attorney General*, 462 F.2d 475,
21 Second Circuit.

22 MR. BIALE: Thank you, Judge. That was a case where
23 an individual was brought here. He was not subject to an
24 extradition treaty, but was just an exercise of international
25 comity.

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1 The Second Circuit said under the line of cases coming
2 from *United States v. Raucher*, which was decided on the same
3 day as *Ker* by the same justice, that it was permissible to
4 surrender an individual pursuant to comity even if it was not
5 in accord with a specific extradition treaty so long as there
6 was not what the Court called a possible affront to the
7 country's sovereignty as a result of an alleged breach of faith
8 with its act of comity. That is the part of *Fiocconi* that
9 Judge Korman was citing. It's footnote 9 of the opinion.

10 And that's precisely what happened here, Judge.

11 The United States' actions in this situation was a
12 ruse. It was a deception of its sovereign partner in Malaysia.
13 That is an affront to Malaysia's territorial sovereignty and to
14 principles of international comity. We know that another piece
15 of evidence that points to that is the language of the treaty
16 it sell, right?

17 So even if Mr. Hiya does not have standing to raise a
18 violation of the treaty, and even if the treaty was not
19 violated here on its terms because he was not extradited, I
20 think the Court can look to the treaty as clear evidence that
21 what the United States did here was to bring Mr. Hiya under
22 false pretenses in violation of its relationship with Malaysia.

23 Now to the question of standing. The government cites
24 *Barinas*, which is a Second Circuit decision, to argue that
25 Mr. Hiya does not have standing to raise a violation of the

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1 treaty. We really don't quibble with that argument. Because
2 what we are talking about here is not a situation where someone
3 was extradited pursuant to a treaty and is raising a rule of
4 specialty objection to their prosecution here.

5 The rule of specialty, as the Court knows, is a rule
6 that says you can only be tried here for the crimes on which
7 you are extradited. *Barinas* holds that an extraditee
8 surrendered pursuant to an extradition treaty does not have
9 standing to raise that kind of rule of specialty defense or
10 objection to charges other than the ones for which he was
11 brought here.

12 The other cases cited by the government stand for
13 exactly the same principle. *United States v. Bankman-Fried*,
14 the issue there is that the government charged
15 Mr. Bankman-Fried with charges that were not part of the
16 extradition agreement with, I think it was the Bahamas in that
17 case. *United States v. Herbert*, which the government cites
18 repeatedly, same issue.

19 By contrast, all of the cases that deal with forcible
20 abduction -- and here I am going to loop back to the
21 *Ker-Frisbie/Alvarez* line -- they all presume that the defendant
22 has standing to challenge the method in which he was brought
23 here, right? There's no question as to standing in those
24 cases.

25 THE COURT: Let me just ask one point on that. You

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1 are sort of drawing this distinction between what we
2 traditionally think of as the rule of specialty in terms of
3 what are the offenses for which a person is extradited.

4 There's certainly a clear line of cases, as we just
5 talked about that says unless there's sort of, you know that
6 the person does haven't standing with respect to that, but in
7 the U.S.-Malaysia treaty it does list under their subsection
8 about rule of specialty, which is Article 16, that this concept
9 that the person can't be then sent to another country that, at
10 least for this treaty, is defined as part of the rule of
11 specialty.

12 So I think that while it is not always seen as --
13 normally the traditional idea of rule of specialty is just what
14 are the offenses, this particular treaty includes the idea of
15 not sending them to another country once the U.S. receives them
16 or I suppose Malaysia receives them as part of the rule of
17 specialty.

18 Does that matter?

19 MR. BIALE: Putting aside questions of whether, sort
20 of -- I think of about this as like a statutory interpretation
21 question. Does the title of the statute matter? Sometimes the
22 Supreme Court says it doesn't matter at all, don't look at
23 that; sometimes they -- you know in that recent aggravated
24 identity theft case, they said, well, it's called aggravated
25 identity theft. So you can go in sort of both directions on

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1 that.

2 But I think it doesn't matter here, your Honor,
3 because that provision of the treaty says -- and maybe we
4 can -- can we have Section 16(2) of the treaty brought back up?

5 While it's coming up, it says -- it says -- that was
6 it -- a person extradited under this treaty shall not be
7 extradited to a third state for an offense committed prior to
8 his surrender unless the surrendering state consents.

9 I think, based on that language, had Mr. Hiya been
10 extradited pursuant to the treaty and then came here and said:
11 This is isn't right. I was extradited, and they're trying to
12 extradite me to a third country, the treaty says that they
13 can't do that.

14 Then the government would say, Well, you don't have
15 standing in the Second Circuit under *Barinas*, right?

16 Now, footnote, but it is an important footnote, I
17 think *Barinas* was wrongly decided. It is totally inconsistent
18 with the Supreme Court's decision in *Raucher*. The majority of
19 circuits that have addressed the question of standing with
20 respect to extradition treaties have come out the other way.

21 I think we pointed your Honor to a number of those
22 cases. One recent one is *United States v. Fontana*, 869 F.3d
23 446 (6th Cir. 2017). If you are going to rule against us on
24 standing grounds, I think that we would ask that you say it's
25 because of *Barinas* and then we can preserve that challenge for

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1 another day.

2 Two other points about *Barinas*, your Honor.

3 First of all, it did not overrule *Fiocconi*. In fact,
4 it cites it favorably throughout the decision. It also
5 obviously did not purport to overturn *United States v. Raucher*,
6 because that is a Supreme Court decision.

7 So to the extent those two cases still have vitality,
8 and I think they do, they made clear that the holding of
9 *Barinas* is limited to this situation where someone who is
10 extradited pursuant to the treaty is raising a rule of
11 specialty objection to particular charges, right? Because
12 *Fiocconi* makes clear that the individual has standing for what
13 it calls a judicial remedy to raise this affront to comity.

14 Okay. Then, lastly, I just want to say that the
15 standing issue is really not relevant to jurisdiction.
16 Jurisdiction was not challenged in *Barinas*. It is not a
17 Section 3184 case. It is, you know, a classic, "they bring me
18 here to face charges in the United States" kind of case. I
19 think that that all of the standing issues that the government
20 raises, as I said at the outset, are really a red herring.

21 I think I've sort of said what I want to say about
22 jurisdiction. I know I've taken a long time. Let me just, if
23 I can have your Honor's indulgence, let me confer with
24 Ms. Harris.

25 MR. BIALE: My wise cocounsel brings up a point that I

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wanted to make but hadn't made. So I just want to end by talking about -- so toward the end of the government's argument the government argued that, even if *Atta I* applies, and even if there is some due process governing this proceeding, Mr. Hiya's allegations don't rise to the level of torture or shocking conduct that were at issue in *Toscanino*.

That is wrong as an argument for a couple of reasons.

First of all, *Toscanino*, as the government said, is an exception to the *Ker-Frisbie* doctrine. I've talked kind of ad nauseam now about why the *Ker-Frisbie* doctrine does not apply. I don't think there's any reason to import the *Toscanino* standard into the 3184 context and into Judge Caden's decision in *Atta*.

Judge Caden's decision in *Atta* is really concerned with procedural due process. The *Toscanino* standard of shocks-the-conscience-type concerns, that is a violation of substantive due process, right? And what *Toscanino* held is even under the *Ker-Frisbie* line of cases, if there is conduct here that so shocks the conscience that it rises to the level of a substantive due process violation, then there may be an exception to the *Ker-Frisbie* rule. That, again, is really not relevant to this case.

THE COURT: What do we do then with *David*, right? We've discussed the fact that there is this line of cases that are criminal in nature where people came here and they had U.S.

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1 cases, and that we have very few examples in the extradition
2 context. It seems like *Atta* and *David* are the only ones.

3 *David* definitely is using the *Toscanino* sort of
4 *Ker-Frisbie* exception. Its analysis of whether or not someone
5 can be black ops, you know, whatever, sort of brought here,
6 kidnapped, whatever language you want to use, if these the only
7 two cases you have, I understand that at *Atta* may be analyzing
8 it differently, but *David* definitely speaks to *Toscanino*.

9 MR. BIALE: It does.

10 I think that the *David* Court was wrong to import that
11 standard into this context, because for all the reasons that I
12 have described, there really is no authority to apply
13 *Ker-Frisbie* and *Toscanino* in an extradition-out case.

14 This Court is obviously not bound by the decision in
15 *David*. It's out of circuit. There's nothing really that --
16 the Court is operating on, I wouldn't say a blank slate, but a
17 minorly drawn-on slate here.

18 It is also distinguished based on the facts. I think
19 if you look at the Seventh Circuit's decision in *David*, the
20 Seventh Circuit is very clear to emphasize that there is no
21 allegation here of any collusion between the United States and
22 France. I don't think there is any allegation that the United
23 States tried to conceal from Brazil that its true purpose was
24 to extradite Mr. David to France, and I don't think you can
25 plausibly say that that was the purpose.

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I mean, *David* is actually more like the hypothetical that I raised before where they bring someone on U.S. charges, the person is tried or deals with those U.S. charges, and then later there is a request from a third country to extradite the person. That's really the situation in *David*.

It's totally different from this case. The point in *Atta I* is that what Judge Caden said -- and I think that this Court should have the exact same concerns -- is that because there are no due process protections that it can rely on in the third country, in this case Israel, and because the due process protections in this extradition hearing are so limited -- in fact the government says there are none -- the Court simply cannot ignore the process by which an individual was brought here unlawfully to face extradition to a third country.

I think this case is in that respect on all fours with Judge Caden's decision. That is really the only precedent that is directly applicable, and we think that that is the decision Court should apply when considering its own jurisdiction.

THE COURT: Thank you.

MS. McCANN: Your Honor, if I may, before moving on to probable cause, just briefly respond to some of the arguments Hiya has made.

To put it plainly, your Honor, the arguments that Hiya is raising are red herrings. Hiya starts out with this distinction between subject matter jurisdiction and personal

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jurisdiction and says that the *Ker-Frisbie* doctrine applies to one versus the other.

To be clear, we are not invoking the *Ker-Frisbie* doctrine. We are simply responding to the arguments that Hiya has made. Our position here is that due process is not a consideration in this extradition proceeding, period.

To the extent the Court wants to apply it, the *Ker-Frisbie* doctrine still lends in the government's favor.

Here jurisdiction squarely falls under Section 3184. There is no factual dispute that Hiya was in New York at the time that we filed the complaint and provisional arrest warrant.

Because Hiya was found in New York, this Court has jurisdiction, not only subject matter jurisdiction, which we think is captured under element one, whether this Court has jurisdiction over this proceeding; and personal jurisdiction under element two, which is whether this Court has jurisdiction over Hiya.

Your Honor, we also want to point your attention to I believe a case that may have been cited in our reply brief. We would agree with Hiya that, again, this is not a criminal proceeding. It's not a civil proceeding. It is a miscellaneous proceeding in which the typical rules do not apply.

But, your Honor, taking that in context, courts have

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1 found that in such proceedings, the manner by which a person is
2 found within a Court's jurisdiction does not absolve the Court
3 of jurisdiction over the person or over the proceeding.

4 The case that we would like to direct your Honor's
5 attention to is *Immigration and Naturalization Service V.*
6 *Lopez-Mendoza*. The case citation is 468 U.S. 1032 (1984). In
7 that case the individual was challenging his deportation
8 proceedings. He alleged Fourth Amendment violations to say
9 that because he was illegally arrested that the Court did not
10 somehow have jurisdiction to hold his deportation proceeding or
11 to have him stand for deportation.

12 The Supreme Court disagreed. They said that the
13 presence or the identity of a person is not suppressible as a
14 fruit of an unlawful arrest.

15 THE COURT: Isn't that a different issue, though?

16 There the question is, you are talking about the
17 Fourth Amendment, right? The issue is there has to be a Fourth
18 Amendment violation, but there also has to be something that
19 was in fact suppressible.

20 There the ruling you is can't suppress the person's
21 existence. The issue of does the Court properly have
22 jurisdiction over them, it doesn't actually seem -- I have to
23 obviously look at the case, but it doesn't seem like that is
24 what that case turned on.

25 Whereas here, not just the extraditee's arguments, but

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1 the governing statute lays out that the Court must have
2 jurisdiction. I don't know that that case really helps much.

3 Obviously I will look at it, and I noted down the case
4 number. But the idea that you can't suppress someone's
5 identity, that is a different issue than does the Court
6 properly have jurisdiction over the person.

7 MS. McCANN: Right, your Honor.

8 I appreciate your Honor's distinction in that respect.

9 I think the key point with respect to that case is
10 that there is a statute that plainly says that if a person is
11 found within this Court's jurisdiction that this Court has
12 jurisdiction over that person. And that is the jurisdictional
13 basis in this case.

14 THE COURT: I take your point on immigration that if
15 you are found in the United States, however you may have gotten
16 here, the United States has jurisdiction over you.

17 But this is not an immigration proceeding or a
18 criminal or a civil. We are in separate land, miscellaneous
19 extradition land.

20 Is it that clearcut in the extradition context?

21 You just said there is a case in immigration that says
22 if you are found in, we have jurisdiction. Yes, that's
23 correct.

24 Is there a case that says merely being here is the end
25 of the inquiry for extradition purposes?

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1 MS. McCANN: Your Honor, I believe that there is a
2 case that outlines whether due process can -- one moment, your
3 Honor.

4 THE COURT: Of course.

5 MS. McCANN: Your Honor, we would submit, as we have
6 before, that the sole basis for jurisdiction is under the
7 statute. The statute should be read plainly, and it should be
8 applied plainly.

9 Because Hiya was found in this Court's jurisdiction,
10 this Court has jurisdiction not only over the proceeding but
11 over Hiya. Now, to the extent that Hiya wants to make due
12 process arguments, we believe that there are other forums where
13 he can make that argument. One would be the criminal
14 prosecution in that proceeding. Another consideration would be
15 before the Secretary of State, because, again, this Court has a
16 limited scope.

17 THE COURT: Let me ask to that point only, because it
18 was raised by the extraditee the idea that, if the conclusion I
19 am to take from *Atta*, if the concern of Judge Caden in that
20 ruling was, the problem with *Atta* was because *Atta* was going to
21 be sent to a country where we don't know if there's going to be
22 due process, it may be a different situation than where there
23 was definitely going to be due process. Defendant has raised
24 this issue that they in fact won't be able to raise some of
25 these questions in the criminal proceeding. And you yourself

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1 just referenced the idea that to the extent that how he got
2 here is an issue, there will be other forums for him to raise
3 it.

4 Does it matter, as defendant said, that he may not be
5 able to raise how he was brought to the United States in the
6 criminal proceeding?

7 Does that matter?

8 MS. McCANN: No, your Honor, it doesn't matter,
9 because in this proceeding Hiya may still raise those
10 arguments.

11 Even to the extent that your Honor issues a
12 certificate of extraditability, there is a process by which
13 Hiya can raise those concerns with the Secretary of State.

14 Again, the Secretary of State has that final decision
15 making power. The Secretary of State reviews the extradition
16 hearing *de novo*. They review the materials *de novo*. They have
17 broad discretion to either move forward with the extradition or
18 not. So it does not matter whether or not Hiya can raise those
19 concerns in the criminal prosecution, because even in this
20 proceeding there a separate forum for those arguments.

21 We also want to highlight that Hiya has continued to
22 use this phrase of forcible abduction, your Honor, but Hiya was
23 not forcibly abducted in this case.

24 We want to direct your attention to Exhibit AA, which
25 was filed by the fugitive. In that document it's clear that

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1 the Royal Malaysian Police transferred custody to the United
2 States.

3 There was no secret that Malaysia was transferring
4 custody to the U.S. The U.S. did not go get Hiya under some
5 false pretense or without Malaysian police knowing when the
6 document clearly reflects that Malaysia voluntarily transferred
7 custody of Hiya to the U.S.

8 THE COURT: I didn't hear them as arguing when they
9 were sort of using this, whatever language you were using to
10 describe how he got brought here, I didn't hear them arguing
11 that it was sort of under cover of night the U.S. crossed into
12 sovereignty territory and kidnapped him in that way.

13 What I heard them saying is that, one, he was
14 obviously not formally extradited through the treaty and that
15 he also was not in fact deported. And they spoke to the idea
16 that there's nothing in the record that would indicate that
17 deportation was in fact the method by which he was brought
18 here.

19 So I don't know that Exhibit AA really addresses the
20 point that they were trying to make. Again, your argument all
21 along today has been it sort of doesn't matter how he got here,
22 that he's here, ergo, that's enough for factor two under the
23 statute.

24 MS. McCANN: Yes. I think that's right.

25 I think we want to address this general argument that

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1 there was some purpose to evade the U.S.-Malaysian extradition
2 treaty or to somehow evade Malaysian authorities to bring Hiya
3 over here.

4 That's simply not true or supported by the document.

5 THE COURT: All right.

6 As to that what I heard in their argument was -- I'll
7 call it lack of candor -- the omissions as they allege in the
8 United States government's communication with Malaysia, meaning
9 not indicating to Malaysia that Mr. Hiya was also a citizen of
10 Israel, not indicating that Israel also wanted him, and deep
11 down it was really the intention of the United States to send
12 him to Israel.

13 That's what I heard in their arguments about the
14 affront to the sovereignty of Malaysia. Not that they stole
15 him from Malaysia, but that whatever it is that led to Malaysia
16 handing him over to the United States, clearly it wasn't an
17 extradition. Is it a deportation? Is it just international
18 comity? Who knows?

19 But what they are alleging was that the U.S.
20 government was deceptive in their communications with Malaysia
21 and deliberately withholding the fact that really what this was
22 all about was the attempted murder in Israel.

23 MS. McCANN: Your Honor, it is just simply not true.

24 THE COURT: It is not that true that that information
25 was withheld, or it doesn't matter?

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1 MS. McCANN: I believe it is not true that the
2 information was withheld, but also that it doesn't matter.

3 It is not true in fact and I don't believe it's true
4 in law.

5 I will walk this just twofold just briefly.

6 Hiya has raised no authority requiring the U.S. to
7 inform Malaysia of an impending extradition request. But in
8 fact the documents reflect that there may have been some
9 communication to Malaysia on this. I can't make
10 representations, as I'm not a part of the criminal prosecution,
11 I can't make representations about what the U.S. agents may
12 have told Malaysia or not.

13 THE COURT: You say there's some evidence that there
14 may have been communication.

15 What is that?

16 What are you pointing to?

17 MS. McCANN: Your Honor, for example, in Exhibit H
18 that is Jane 10, 2024, communication from the FBI to Malaysia,
19 this is a document that Hiya cited as scrubbing Israel from
20 communications to Malaysia.

21 Even in this document there is a quote that Hiya was
22 recently relocated to Malaysia in order to evade an ongoing
23 feud with Israeli crime families. So this notion that the U.S.
24 somehow evaded this treaty by concealing the fact that Hiya was
25 wanted in Israel is just simply not supported. It is not

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1 suggested in the documents.

2 THE COURT: Evading an ongoing feud with a crime
3 family doesn't necessarily mean that the country wants him to
4 charge him with a crime. I don't know. Someone can be a
5 target of a crime family because you witnessed a crime that
6 they committed.

7 I don't know that this particular document speaks to
8 full candor with Malaysia. Again, I take your point that maybe
9 it doesn't matter and pretext is maybe okay.

10 MS. McCANN: Yes. Sure.

11 Your Honor, I think to that point, that's the crux of
12 the argument is that there's no authority that prosecutorial
13 discretion or the timing of when an extradition request comes
14 in, there is no authority that requires or that supports a
15 basis for a due process violation.

16 That there was an extradition request at a certain
17 time, and we brought passport fraud charges at a certain time
18 does not mean that there is a due process violation, and Hiya
19 has not put forth any authority to support that basis.

20 So, your Honor, we would submit that not only is it --
21 you know, I take your Honor's point that you may not see it
22 from the documents, but even in law, as we mentioned initially,
23 the existence of an extradition treaty does not require the
24 U.S. to invoke it.

25 This argument was rejected -- and I think Hiya may

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1 have raised this case -- in the *U.S. v. Herbert* case. In that
2 case the defendant alleged that his extradition violated the
3 treaty between the U.S. and Belize, and conceded that there was
4 a pending extradition request, and that because he was
5 kidnapped in Belize by Belizean authorities and expelled to the
6 U.S. that there was somehow some violation of the treaty, of
7 the extradition treaty.

8 The Court concluded that because the defendant was not
9 transferred to U.S. custody under that treaty, that there can't
10 be a violation of it. I think, your Honor -- I know we've
11 belabored this jurisdictional point, but I just want to put it
12 plainly. Hiya cannot argue a forcible abduction, or this
13 argument at the same time as arguing a violation under an
14 extradition treaty.

15 There was no extradition that took place from
16 Malaysia, and there are no documents to support that we invoked
17 the treaty in transferring custody from Malaysia.

18 THE COURT: I don't think there is a dispute as to
19 that.

20 The use to which I thought the extraditee was using
21 the treaty was merely to talk about I suppose questions of
22 sovereignty, right? The idea of what's important to Malaysia
23 and the fact that that kind of language that's under their rule
24 of specialty Article 16 section is in there speaks to the
25 idea -- their theory -- that the U.S. was deliberately

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1 misleading Malaysia because if Malaysia had known that Israel
2 wanted Mr. Hiya, they may not have turned him over.

3 I certainly didn't hear them arguing this was in fact
4 an extradition and we are now bound by that treaty. I took
5 that merely to be an indication of these are the types of
6 things that Malaysia cares about. Therefore, when we are
7 thinking about the language that they are talked about, the
8 affront to sovereign immunity -- not immunity, sovereign
9 whatever -- that I should look to the treaty as evidence of
10 what Malaysia is concerned about.

11 MS. McCANN: I think the point we are making, your
12 Honor, is exactly that. Is that what Malaysia cares about is
13 immaterial in this proceeding, because the extradition treaty
14 has not been invoked.

15 Hiya wants you to believe that extradition treaties
16 govern the relationship between the U.S. and Malaysia. That's
17 not true -- or the U.S. and whoever the country that has the
18 extradition treaty. That's simply not the case. Extradition
19 treaties govern extraditions. That is the scope of an
20 extradition treaty between the U.S. and a another nation.

21 As I mentioned before, Hiya cannot identify a single
22 authority requiring Malaysia's consent for this Court to
23 certify his extradition. The only authority requiring
24 Malaysia's consent would be the U.S.-Malaysia extradition
25 treaty. That's why I've raised the extradition treaty as kind

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1 of the basis for that argument.

2 Your Honor, we also want to make clear that there is
3 no basis for this argument regarding a sham passport fraud case
4 or investigation. Hiya has raised no basis for that, and it's
5 simply not the case. I think as you have seen in our
6 briefing --

7 THE COURT: I think their argument -- the use of the
8 word "sham" even under theory may not be the right term.
9 Certainly what I heard them strongly arguing is the idea that
10 the U.S. passport fraud case was a pretext, that the timing of
11 when the United States supposedly started talking to Israel
12 about the whereabouts of Mr. Hiya, the timing of when Israel
13 issued a warrant for him, when the red notice was issued, when
14 he was in fact detained under whatever in Malaysia, all
15 predates the passport fraud warrant, that the timing alone sort
16 of shows clearly Israel wanting him for attempted murder came
17 first.

18 The U.S. was communicating with them about that and
19 then gets this passport fraud case afterwards. So I don't see
20 their arguments to say that the passport fraud case isn't real,
21 but that it was a pretext, that that case was brought in order
22 to effectuate their ability to get Mr. Hiya here.

23 MS. McCANN: Again, your Honor, there is no authority
24 for that argument. There's no authority that pretext or
25 prosecutorial discretion is a basis nor a due process

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1 violation.

2 Timing can just be circumstantial, and they've offered
3 no legal authority to say that because there was timing between
4 the criminal prosecution and the extradition request that
5 somehow there's a due process violation.

6 Because there is no authority, your Honor, we would
7 submit that that does not absolve this Court's jurisdiction.

8 MR. BIALE: May I just very, very briefly --

9 THE COURT: Let me just --

10 Were you done on your jurisdiction issues?

11 If so, I believe extraditee had a brief surreply
12 before we move on to probable cause. But I didn't want to cut
13 you off if there was more in response to their argument that
14 you wanted to say.

15 MS. McCANN: Your Honor, I just wanted to briefly
16 address the standing argument. I think we've outlined this in
17 briefings quite a bit, but, again, the extradition treaty, to
18 the extent that it even applied in this case, which it does
19 not, Hiya does not have the ability to raise a violation under
20 a treaty to which he's not a party.

21 That comes from the *Barinas* case. It is outlined in
22 briefing, but I wanted to make clear that there is a circuit
23 split, but the Second Circuit has been clear that an individual
24 who is not a nation party to a treaty cannot raise an alleged
25 violation under it.

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1 THE COURT: Mr. Biale.

2 MR. BIALE: Very briefly. I can do it from here.

3 I am not going to go back over the legal arguments. I
4 just want to point the Court to the evidence of, I think we
5 called it the scrubbing of documents that were sent to
6 Malaysia. We described that at pages 4 and 5 of our brief.

7 The chronology of events that I discussed before is
8 really at pages 8 to 12 in our brief.

9 I would just point the Court, if you look at Exhibit
10 J, the last page has biographical data on Mr. Hiya that the FBI
11 provided to Europol, which has his date of birth. It says U.S.
12 citizen, it has numbers, Israel, it has his Israeli passport
13 number, Moroccan, etc.

14 If you look at basically the same information on
15 Exhibit H, which is a document that the FBI provided to
16 Malaysia, it has the same biographical data, but it says Eran
17 Hiya, date of birth, passport and visa information, U.S.
18 citizen, and it lists the numbers, and then it says Moroccan,
19 Turkey, UAE. They took out Israel from the biographical data.

20 MS. McCANN: Your Honor, I would have to object to the
21 notion that we have taken out communications when there is no
22 evidence that we've taken out --

23 MR. BIALE: It's nothing --

24 THE COURT: I hear that you disagree with the
25 conclusion that --

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1 MS. McCANN: It is just the characterization of "taken
2 out" suggests that they've seen some original communication.

3 THE COURT: The argument is there are two examples of
4 documents where the United States has identified Mr. Hiya.

5 One of them includes a number of countries, including
6 Israel. The communication sent to Malaysia notably does not
7 include Israel.

8 I will draw my own conclusions about why that may be
9 or not be, and then the second question of whether or not it
10 matters.

11 MR. BIALE: Sure, your Honor.

12 You know, look, I will just add to that point, the
13 government has the evidentiary burden here. They have gotten
14 up and said, oh, we did tell Malaysia. They knew about the
15 Israel situation.

16 I mean, that is sort of what I heard. They said we
17 haven't produced evidence, sufficient evidence that it was
18 concealed from them, and I think that she said and in fact it
19 is not true.

20 Well, if in fact it is not true, the government can
21 produce evidence to --

22 THE COURT: The largest part of the government's
23 argument that I heard is that they don't think it matters.

24 MR. BIALE: I'm sorry.

25 THE COURT: Whether we're black ops-ing, which is

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1 really not what is going on here, or lying to Malaysia or
2 deporting or whatever it is, that it does not matter because as
3 long as he is here that this Court has jurisdiction over him.

4 MR. BIALE: Understood, your Honor.

5 The last thing I will say, just because I hear you
6 don't like sham passport fraud, another way of thinking about
7 it is the tail that wags the dog. That's perhaps a more apt
8 phrase.

9 I do think, contrary to the government's argument, we
10 have cited authority for why that matters. That's *Atta I*,
11 that's *Fiocconi*, and the other cases that are cited in our
12 brief.

13 With all that said, on the jurisdictional point, I'll
14 rest on our papers.

15 THE COURT: Thank you very much.

16 MS. McCANN: Your Honor, may I just check before
17 moving on to probable cause?

18 THE COURT: Yes, of course.

19 MR. BIALE: What would the Court think about a
20 five-minute bathroom break?

21 THE COURT: Sure why don't we do that. We'll break
22 for just five minutes.

23 You can stand up, consult if there is a last point
24 that perhaps you're consulting what that you want to make on
25 jurisdiction. I will be happy to hear that as well, or we can

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1 just move right into probable cause when we come back.

2 MR. BIALE: Thank you, your Honor.

3 MS. McCANN: Thank you, your Honor.

4 (Recess)

5 MS. McCANN: Your Honor, we had a chance to just
6 briefly confer with Hiya's counsel during the break. We
7 anticipate that both of our remarks on probable cause will be
8 very brief. We will just highlight the key points on our
9 respective arguments, and then address any questions that your
10 Honor might have.

11 THE COURT: Let me just say I do not mind long
12 arguments as long as they are helpful and thoughtful. At one
13 point during today's proceeding -- I don't way which of the two
14 of you was standing, it could apply to either one -- I Teamed
15 my law clerk and said, "Good lawyering is its own reward."

16 So I think certainly the parties here have been very
17 thorough. The briefs were helpful. The oral argument has been
18 helpful. I'm still mulling over one or two issues, but that is
19 not your fault. You certainly addressed the point, but I am
20 trying to decide how I am going to do that.

21 MS. McCANN: We appreciate that, your Honor.

22 THE COURT: Certainly fine to go long if it's helpful,
23 but I appreciate that we don't think the next part will go as
24 long.

25 MS. McCANN: On probable cause, your Honor, we believe

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1 the applicable standard pursuant to Section 3184 is that the
2 Court must only find that the evidence is sufficient to sustain
3 the charge.

4 So in this extradition proceeding context, we believe
5 that that's essentially the same standard that's in used in
6 federal preliminary hearings in the same inquiry that would be
7 used for the issuance of an arrest warrant or a search warrant.

8 So I won't go through the facts in great detail, but
9 the charges Hiya is wanted for are charges involving attempted
10 murder, conspiracy to commit a felony, unlawfully, possessing,
11 carrying, or transporting weapons, changing the identity of a
12 vehicle or vehicle part and destruction of evidence.

13 So between January 2022 and January 2024, the evidence
14 shows that members of Hiya's gang committed serious criminal
15 offenses against a rival gang leader and its members. So the
16 evidence to support these crimes comes in a number of different
17 forms. Those forms include statements from cooperating
18 witnesses, that who are referred to in our brief as AA and BB.

19 Those statements show a number of things, including
20 that one of the cooperating witnesses, AA, met in person with
21 Hiya several times, including several months before the murder
22 attempt, that AA communicated with Hiya through a cell phone
23 that was used for the distinct purpose of communicating
24 discreetly with Hiya, that Hiya equipped AA with a firearm for
25 protection, and a number of other factual evidentiary support

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1 for the alleged crimes.

2 Israel's request also includes the contents of two
3 cell phone devices from one of the cooperating witnesses. The
4 contents show photos and video footage, including a group chat,
5 among Hiya, witness AA and other coconspirators the night
6 before and the morning of that murder plot.

7 The evidence also includes surveillance footage,
8 including from near the rival gang leaders residence, which
9 shows that they were surveilling the residence and speaking
10 with Hiya about that surveillance.

11 The evidence includes seized getaway vehicles that
12 were procured at Hiya's direction, and wiretaps that indicate
13 Hiya's leadership over the gang, had leadership over the gang
14 and the assassination attempts.

15 We believe that there is sufficient probable cause,
16 especially under that preliminary hearing type inquiry, that
17 Hiya committed these offenses for which he is wanted.

18 The court's role, again, is not to hold a trial on the
19 merits. It is simply just to review what Israel has submitted
20 and determine whether that is sufficient to sustain the
21 charges.

22 The only legal point that we want to make, your Honor,
23 that we want to highlight here, I think the rest of it is
24 outlined in our briefing, is that there are substantial
25 limitations on a fugitive's ground for opposing an extradition

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1 request.

2 This is partially the reason why we would object to
3 the admission of additional evidence or documents that are not
4 already a part of the case record.

5 A fugitive is not entitled to introduce evidence that
6 contradicts the evidence submitted by the requesting state.
7 Instead, a fugitive's right to dispute the evidence introduced
8 against him is limited to testimony that explains rather than
9 contradicts the demanding country's proof.

10 So we believe that that standard, this explanation of
11 explanatory evidence is limited to clearcut proof that would
12 completely obliterate probable cause. And "obliterate" is the
13 word used by the Second Circuit, and that case is *Shapiro v.*
14 *Ferrandina*. The case citation is 478 F.2d 894 (2d. Cir. 1973).

15 THE COURT: Let me ask you a question of sort of the
16 limits on the proof or evidence that an extraditee can offer.
17 This question about not contradicting, but you can't introduce
18 evidence that would contradict, only evidence that would
19 explain, what if -- because some of the arguments that the
20 extraditee seems to be making are merely pointing out, I'll
21 call it contradictions within, the government within Israel's
22 proof.

23 Is that allowed? Because it's not then introducing
24 evidence that would contradict. It is them pointing out
25 contradictions in the evidence that is offered by the country

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1 that is seeking him. So would that be allowed under sort of
2 the precedent about the limited nature of this kind of
3 proceeding?

4 MS. McCANN: That type of evidence would not be
5 allowed, simply because that type of evidence -- and I think
6 your Honor is referencing maybe evidence that Hiya was not in
7 Israel at certain times or evidence that --

8 THE COURT: Well, Hiya not being in Israel at certain
9 times I think is them offering evidence. I understood some of
10 their argument to be -- and maybe I should have waited for them
11 to go first, and then pose the question to you, but I wanted to
12 get your thoughts while were you already standing on your feet.

13 Some of it I took to be contradictions between, for
14 example, what AA says and BB about who was where and when --
15 that's sort of an internal contradiction -- as opposed to
16 information about where Hiya may or may not have been and also
17 the information about the idea that AA may be a paid informant
18 and therefore may be unreliable. I look at that as -- I will
19 call it external, offering evidence.

20 But what about here's contradictions amongst the
21 evidence that Israel is offering up?

22 Is that allowed?

23 MS. McCANN: No, your Honor. I think for the reasons
24 because, one, that would require the Court to weigh evidence
25 and to assess the credibility of certain witnesses, to assess

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1 the weight of certain evidence, and because considering that
2 type of evidence in this type of proceeding would expand the
3 scope of this hearing, right?

4 Those questions and whether certain evidence is
5 reliable because certain witnesses have said X and other
6 witnesses have said Y, those are questions for a fact-finder.
7 That is not the scope of this hearing. That is the scope of
8 the trial that Hiya would be standing for in Israel.

9 So we think this is important because allowing those
10 types of arguments and allowing that type of evidence would,
11 again, widely expand the scope -- inappropriately we think --
12 of this type of hearing.

13 I think any evidence that implicates credibility or
14 factual disputes in connection with the conduct that is alleged
15 substantively with respect to those crimes should not be
16 permitted unless there is evidence that, to use the Second
17 Circuit's words, completely obliterates probable cause. That
18 evidence does not -- it simply just requires a Court to weigh
19 what they think may be more important versus other evidence.

20 So, your Honor, I think that's the only legal argument
21 we wanted to highlight for your Honor today.

22 Unless your Honor has additional questions, we will
23 rest on the probable cause.

24 THE COURT: All right. I don't have more questions at
25 this point, but I may after hearing from Mr. Biale.

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1 Thank you.

2 MR. BIALE: Thank you, your Honor.

3 So this is a weird standard. We can't introduce
4 evidence that contradicts, but we can introduce evidence that
5 explains or obliterates probable cause.

6 You know, an example, I have to admit I have been kind
7 of scratching my head trying to figure out what that means. In
8 the *Shapiro* case that the government cited there is an example
9 that I think is helpful, which is the court says the
10 improbability or the vagueness of testimony may destroy the
11 probability of guilt, but the tendering of witnesses who
12 testify to an opposite version of the facts does not.

13 I think that's helpful insofar as, I mean, maybe it
14 doesn't get us so far, but it's helpful insofar as I think it
15 addresses what your Honor was getting at with the question of
16 internal contradictions within the submission, the request, and
17 the supporting papers of the state of Israel.

18 I think to the extent your Honor reads those and
19 develops doubts about the probability of the evidence, that is
20 perfectly fair game, and that's part of -- you know, look, it
21 is in the discretion of the Court to think about what are the
22 indicia of reliability of this hearsay evidence, right?

23 You're being presented with almost entirely hearsay
24 evidence of the statements of cooperating witness AA. I am
25 going to talk about some of the other material there, but

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1 that's primarily the guts of this thing.

2 THE COURT: But what is your response to the
3 government's argument that clearly, however one were to
4 interpret this obliterate versus explain versus contradictory
5 and what it all means, clearly an extradition hearing, you
6 know, is not meant to be a full trial.

7 The argument that the government made that it would
8 not be appropriate for me to be weighing evidence in the way
9 that you would if you are the trier of fact and making
10 decisions about who's to be believed and who's not to be
11 believed, what's credible and what's not credible, and if we
12 have inconsistent statements from two potential -- well,
13 Israeli witnesses, that it would not be appropriate in this
14 kind of forum for me to say, well, this is reliable here,
15 that's reliable there, particularly in the absence, frankly, of
16 actual live testimony where I could make those kind of
17 credibility judgments.

18 What is your response to that?

19 MR. BIALE: Look, I think that that is right so far as
20 it goes in that we could not submit to your Honor an affidavit
21 or a declaration or bring in a witness who says, you know, AA
22 said this happened, but I was there and it didn't happen.

23 Right?

24 That would tend to contradict AA's testimony. But I
25 think much in the same way that your Honor is, you know, when

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1 an AUSA or an agent brings you a complaint or a search warrant
2 application, your Honor is called upon to assess whether
3 probable cause is sufficiently set forth in that document, and
4 your Honor can look to the whole document and make
5 determinations about, okay, well, you know, if you say this and
6 you say this, those can't both be true.

7 I am not weighing them and saying which one is right,
8 but one might tend to obliterate the other, right?

9 I think that in exactly the same way that your Honor
10 considers the probable cause showing as a whole in a search
11 warrant application or an arrest warrant application, that's
12 what you should do here.

13 Here there are those kind of internal contradictions
14 in the government of Israel's submission. So, for example, you
15 know, we talked about in our papers these meetings in late
16 December 2023 and early January 2024 that sort of characterizes
17 the critical planning meetings, and they say that Mr. Hiya was
18 present for them.

19 The government's own documents that we have submitted
20 and are part of the record of this hearing, this is not us
21 bringing Mr. Hiya's testimony, it is not us bringing in, you
22 know, a witness or anything. These are part of the record that
23 the government has shown that he was not in the country at the
24 time.

25 But you don't even have to look that far. Because if

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1 you look at those paragraphs, they say that Mr. Hiya was
2 present at those meetings with a group of people that included
3 BB, but later in the affidavit of Pnina Levi, which is
4 submitted as an attachment to the request, it says that BB has
5 never met Mr. Hiya in person.

6 So it cannot be that Mr. Hiya was present at those
7 meetings with BB and that BB has also met Mr. Hiya in person.
8 At a minimum I think that that tends to obliterate one or the
9 other of those facts, right?

10 Maybe the government is right that you can't weigh
11 those against the other, but I think that it's sort of like in
12 some ways almost akin to like a *Franks* standard. If you have
13 evidence that is contradicted within the application itself, I
14 think what you should probably do is just disregard that
15 evidence and then think about is there some residual probable
16 cause left here.

17 THE COURT: Disregard which piece of it? Or are you
18 saying both? If simultaneously the application is asking me to
19 than collide that Mr. Hiya as present with BB at an in-person
20 meeting and also that BB has never in fact met him, does that
21 mean I am to assume that he wasn't there in person or he didn't
22 meet BB ever or both?

23 MR. BIALE: I think we have additional information
24 here that makes it clear that at least the first part of that
25 is correct, right?

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1 Because we have documents from the government. We
2 have a whole record here of Mr. Hiya's travels, right?

3 He's going from Indonesia to Malaysia, and there's no
4 record that he entered Israel. In fact, if he had come to
5 Israel, we all would not be in this courtroom right now because
6 he would be -- you know, the Israelis would have gotten him at
7 that point. They wouldn't be going through all these hoops to
8 try to extradite him from the United States.

9 I think that it also serves to undermine any purpose
10 that BB serves as corroborating AA's testimony, because they
11 cannot both be true at the same time.

12 Now let me address the issue with respect to AA.

13 We know from evidence that has been, from the
14 cooperation agreement that has been disclosed in court in
15 Israel that AA is a paid informant.

16 Obviously that piece of evidence, your Honor is right,
17 that is external to the record that you have before you. But
18 it is precisely the kind of information that you would expect
19 and have a right to demand be part of a search warrant
20 application or a complaint.

21 When you are being asked to rely on testimony provided
22 by a cooperating witness or a confidential informant, it is
23 essential to your assessment of probable cause that you know
24 any inducements that person has received, if they're likely to
25 get leniency, if they're paid, the fact --

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1 THE COURT: But doesn't that all go to credibility?

2 Again, we are in this bizarre posture where you cannot
3 contradict, right? Normally what you would say is here's a
4 witness and they've offered up some evidence and here's all the
5 things that we know about this person for why you should not
6 believe them.

7 Here, it's what is on the face of the petition from
8 Israel. They have a witness who they say, a cooperating
9 witness who says this happened and that happened and the other
10 things happened.

11 It feels like it's going back into this territory that
12 the government said I cannot go into of weighing and
13 evaluating, right?

14 What you are saying, and you are certainly right, in
15 an application for a warrant here in the United States if there
16 is a confidential source, the government is going to put in
17 their footnote about, you know, whatever, paying them, they
18 have been honest before, or maybe they told a lie or whatever
19 it is.

20 But I don't know that that means, one, that a foreign
21 country is required to produce that information; number two, if
22 they don't, the jurisprudence in this context seems to say that
23 that is exactly the sort of I'll call it sort of external or
24 offering of information by the extraditee which I am not
25 allowed to kind of look into.

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1 MR. BIALE: Well, your Honor, the reason I think
2 that's different is because I don't think that contradicts
3 specific testimony that AA has given. I think what it serves
4 to do is to undermine your Honor's ability to find that there's
5 sufficient indicia of reliability to AA's testimony to meet a
6 probable cause threshold, right?

7 That's why that information is in search warrant
8 applications and complaints, right?

9 Not because you are supposed to weigh the testimony
10 versus this inducement and come up with some mathematical
11 calculation for whether the testimony is sufficiently reliable
12 that it overcomes the inducement, but it's simply part of what
13 your Honor has to consider to determine whether the probable
14 cause showing has been met.

15 So I think it's a critical fact that, given that it's
16 omitted from the application here, is something that tends to
17 obliterate the -- I don't want to say the credibility, but to
18 the extent that the testimony of AA is a fundamental piece of
19 the probable cause showing that the government is trying to
20 make here, the fact that you have been deprived of this
21 information that is sort of critical to assessing AA as a
22 witness, that obliterates any probable cause showing that is
23 based on his testimony.

24 I understand the Court's -- I mean, I think part of
25 the problem is we're in this confusing territory here, but I

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would just point the Court back to what the court said in *Shapiro*, which is not that you just accept at face value the testimony of a witness, but that you can look at things like improbability or vagueness, right? And you can make an assessment about whether there is sufficient indicia of reliability for probable cause. That's really what this is issue goes to.

Very briefly, I just want to address the categories of evidence that the government pointed to besides the statements of the cooperating witnesses, because I think your Honor understands our argument with respect to those.

So there's four things the government points to.

There's the contents of cell phones. The issue there is the only contents of the cell phones that are specifically set forth in the application and that Ms. McCann pointed to is a group chat that they say includes Mr. Hiya. But in fact what it includes is a Turkish phone number that AA has attributed to Mr. Hiya. Mr. Hiya was not in Turkey at the time. Again, this issue sort of devolves back to the credibility of AA's tieing that to Mr. Hiya. That evidence on its face doesn't serve to corroborate AA in any respect with respect to what AA has told the government about Mr. Hiya.

The second is surveillance footage. That footage does not show Mr. Hiya at all. There's footage from Ben Gurion Airport that shows AA there. There's other surveillance

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1 footage of AA and other individuals tracking Mr. Musli's
2 movements.

3 There's no surveillance footage of Mr. Hiya, save for
4 one thing, which is that they have one shot of a FaceTime
5 conversation that AA is apparently having with Mr. Hiya. We
6 don't know when that occurred. We don't know what's being
7 discussed.

8 Obviously all the information that we have about why
9 that is relevant to this crime or this alleged crime comes from
10 AA's testimony. Perhaps it corroborates that AA in fact knows
11 Mr. Hiya, but I think that's as far as it goes.

12 The seized getaway vehicles, similarly, without AA's
13 statement that Mr. Hiya had some role in procuring them or had
14 any involvement with them whatsoever, they on their own don't
15 tell us anything about Mr. Hiya's involvement.

16 Then finally the wiretap conversations. I think
17 there's essentially three categories that are discussed in the
18 request.

19 One is a conversation in a Mazda car in which Mr. Hiya
20 is apparently not a participant and there's sort of conclusory
21 allegations similar to what Ms. McCann said, about they show
22 Mr. Hiya was the leader blah, blah, blah, but we don't have any
23 specific evidence about what is said. I think we can infer
24 that -- well, withdrawn.

25 There is one recorded call with Mr. Hiya in which it

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1 says that the parties wish each other happy new year and they
2 talk about, among other things, Mr. Musli, but they apparently
3 do not mention the murder plot that is supposedly being
4 masterminded by Mr. Hiya at the exact same time.

5 You know, the request is, it doesn't have any specific
6 allegations that they are talking about that, but it doesn't
7 very specific allegations about them talking about other
8 things. So that again doesn't put Mr. Hiya into any conspiracy
9 for attempted murder.

10 Then finally there's wiretapping and video
11 surveillance at the home of someone named Shalomi Neambrich.
12 It doesn't mention Mr. Hiya at all.

13 If you were to take this and take the sort of *Franks*
14 example that I talked about, and you really look at what is the
15 evidence that we have here that doesn't have these problems, we
16 have one conversation where Mr. Hiya is wishing people happy
17 new year and mentions the name of the target. We have one
18 FaceTime conversation that he has with AA. That's essentially
19 it.

20 I submit, your Honor, that if you were brought an
21 arrest warrant application that said Mr. Hiya is -- you know,
22 we want to charge him with conspiracy to commit murder of this
23 individual and here's what we've got, we've got this one piece
24 of surveillance footage and we've got this one conversation, I
25 don't think that would meet the standard of probable cause.

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1 I have basically said everything that I had planned to
2 say, so I will say I rest on my papers, but I think I've
3 already gone way beyond that. So I am going to sit down.

4 MS. McCANN: Your Honor, I don't have much to add.

5 I think I just want to stress the point that what he
6 is asking this Court to do is again weigh the evidence and
7 consider the substance of the evidence that Israel has
8 submitted to an extent that is inappropriate for this
9 limited-scope hearing.

10 Israel has set forth several types of evidence to
11 support at least five types of crimes. Your Honor, we believe
12 that that is sufficient.

13 Again, the standard is sufficient to sustain the
14 charge, not sufficient to find Hiya guilty of these crimes.
15 We're simply saying is there enough evidence to support sending
16 Hiya back to Israel to stand trial. The issue of weighing
17 evidence and whether the evidence that Israel set forth shows
18 Hiya or doesn't show Hiya sufficiently are questions for --

19 THE COURT: Well, the question of whether the evidence
20 that is in the application from Israel is sufficient to support
21 probable cause is exactly what I am to be determining, but I do
22 take your point that some of the extraditee's argument is
23 premised on this idea that it's not reliable or it's
24 contradictory or I should have had more information about the
25 cooperating individual in terms of whether they are being paid

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1 and the like.

2 But I see those as two different things, right?

3 One of them definitely I think unquestionably is
4 something I am to do, which is when there is an application is
5 there enough?

6 Sufficiency is exactly the question.

7 MS. McCANN: Yes, your Honor. I think that's right.

8 I think to the extent, though that we are getting into
9 questions of weighing the evidence and weighing witness
10 testimony and applying credibility to certain pieces of
11 evidence over others, I think those are questions that are more
12 appropriate before a trial judge, and that is just not what
13 this Court has been tasked to do.

14 So, your Honor, we believe that what Israel has
15 submitted is sufficient to again sustain the charge that the
16 prosecutors in Israel say that Hiya has committed and to send
17 Hiya back to Israel to then refute the substance of these
18 charges.

19 MR. BIALE: I am hopefully going --

20 THE COURT: I addressed this earlier that I don't want
21 anybody tripping and falling in the courtroom.

22 MR. BIALE: We are almost there. We're getting
23 through it without injury.

24 I just want to bring to the Court's attention, this is
25 one of the nice things about having very smart lawyers who work

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1 with you. Mr. Erdelack pointed out to me that a case that we
2 cited in the papers or someone cited in the papers, *Gill v.*
3 *Imundi*, which is 747 F.Supp. 1028 (S.D.N.Y. 1990).

4 In that case, I assume it is a district judge
5 reviewing a magistrate's judge's decision on a habeas
6 application, the judge says, "The magistrate does appear to
7 have been mistaken to the extent he expressed on occasion the
8 understanding that the extradition court lacked the authority
9 and discretion to go beyond the face of the government's
10 affidavits for purposes of determining credibility or
11 reliability. That does not mean that the magistrate is
12 required to do so and the record does not reveal that the
13 magistrate abused his discretionary power in this regard. It is
14 recognized that the credibility of witnesses and the weight to
15 be accorded their testimony is solely within the province of
16 the extradition magistrate."

17 So that's from the *Gill* decision. I wanted to bring
18 that to the Court attention because I don't want to be thought
19 of undermining a points of law that we would have in our favor
20 based on my prior remarks.

21 Thank you.

22 THE COURT: Thank you.

23 Ms. McCann, it is your burden.

24 Was there anything?

25 MS. McCANN: Sorry. One moment, your Honor.

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1 Your Honor, just briefly just to address the *Gill*
2 case, we just want to put on the record that we don't have
3 additional context on that case, but we do believe that it is
4 an isolated opinion. Our position is that it is an outlier and
5 wrongly decided, so we would disregard that case as just an
6 isolated opinion under that context.

7 Your Honor, I believe that the government rests on
8 probable cause. We would just like to formally request on
9 behalf of the government of Israel that this court issue a
10 certificate of extraditability.

11 Again, to the extent that the Court would like a
12 proposed order, we are able to provide that for the Court now
13 or we can file it on the docket at a later time.

14 Thank you.

15 THE COURT: All right. I don't need that now because
16 I am not prepared to rule right now. But you can certainly
17 file that on the docket. To the extent that I do find that he
18 is extraditable, I am sure that the certificate outlines what I
19 need to say in that certificate.

20 I have one issue that I may want some very brief
21 additional briefing on from the parties. I want to formulate
22 what my question is. It is just one issue.

23 Beyond that I know we had spoken earlier about the
24 idea that probable cause is the standard for all five of the
25 facts, again, I don't need a lot of bells and whistles on that,

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1 if there is a case that you can direct me to now or later, just
2 let me know, and I would be happy to have that.

3 MS. McCANN: Your Honor, if we may just briefly
4 address that now, we did previously say that we believe that
5 probable cause was the standard for jurisdiction on all five
6 elements. We went and checked the case law.

7 There isn't any case litigation on the standard for
8 jurisdiction in extradition proceedings because the standard is
9 outlined in the case law as being a factual dispute strictly
10 under Section 3184. It's whether the person is found in the
11 jurisdiction or not.

12 THE COURT: All righty. So then I will not look for
13 some case forthcoming. That does at least make me feel better,
14 because I couldn't figure out what it was, and I thought I will
15 just ask the parties, and if there is an answer I am sure one
16 of them will know it. Apparently there is an answer.

17 Beyond that, if there's nothing else, what I expect to
18 do in the next day or two, I am going to want, again, narrowly
19 tailored additional briefing. I will either file a written
20 order or a text order to that effect.

21 I don't expect to go back over all the ground that we
22 have covered. There's been extensive briefing already and, as
23 I said, some really helpful arguments, but there is one thing
24 in particular I feel like it could be useful to have some
25 additional information about. I just want formulate my

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1 question on that.

2 Other than that, we will be adjourned.

3 Everyone have a good rest of your day.

4 (Adjourned)

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GOVERNMENT EXHIBITS

Exhibit No.

Received